UNITED STATES TRUSTEE PROGRAM: WATCHDOG OR ATTACK DOG?

HEARING

BEFORE THE

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COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

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UNITED STATES TRUSTEE PROGRAM: WATCHDOG OR ATTACK DOG?

TUESDAY, OCTOBER 2, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:06 p.m., in room 2237, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Sánchez, Johnson, and Cannon.

Staff present: Susan Jensen, Majority Counsel; Stewart Jeffries, Minority Counsel; and Adam Russell, Majority Professional Staff Member.

Ms. SÁNCHEZ. This hearing of the Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, will now come to order.

I will recognize myself for a short statement.

This past May, the Subcommittee conducted an oversight hearing focusing on the implementation of the 2005 amendments to the bankruptcy code. Critics noted that these so-called reforms were particularly problematic with respect to how they impacted consumer debtors.

Bankruptcy, which once served as a safety net for the honest, but unfortunate, debtor is now a minefield, as exemplified by the 2005 amendment's new means testing and credit counseling requirement.

To satisfy the means test, a chapter 7 debtor must now complete official Form 22, consisting of 57 sections. This complex form requires the debtor to supply extensive financial information and supporting documentation.

And even the GAO found that while credit counseling was generally a useful tool, there were several shortcomings regarding the implementation of the credit or counseling requirement.

We are putting people through a bureaucratic maze while they are trying desperately to regain their financial footing. This is why Congressman Brad Miller and I, as part of our legislation to address the subprime mortgage crisis, included provisions alleviating some of these barriers to the bankruptcy process.

As highlighted at our hearing in May and subsequently underscored at a hearing in the Subcommittee held last month, recent

developments in the subprime mortgage industry have brought to light additional problems.

After being lured into easy mortgage refinancing arrangements with teaser interest rates, more and more American homeowners find that they are unable to make their monthly mortgage payments. As a result, many attempt to enter into bankruptcy to avoid losing their homes to foreclosure.

However, the new rules prevent many of them from doing so because of the difficulty in navigating the bankruptcy process.

According to a recent survey of bankruptcy attorneys by the National Association of Consumer Bankruptcy Attorneys, 81 percent agreed that it is more difficult for people facing foreclosure to obtain bankruptcy relief since the 2005 amendments were enacted.

There may yet be another contributing factor to the problems presented by the 2005 amendments. Earlier this year, the Appropriations Committee expressed concern that the United States Trustee Program is expending excessive resources to dismiss consumer bankruptcy cases for insignificant filing defects and that as a result of these efforts, the program was imposing additional burdens on the judicial system and debtors.

The Committee also asserted that the program was making burdensome requests for debtors to provide documentation that has no material effect on the outcome of bankruptcy cases. Such actions, according to the Appropriations Committee, are making the bankruptcy process more costly and, therefore, less available for those who truly need it.

More importantly, the Committee recommended reducing the program's appropriations by approximately $30 million. These are very serious allegations by the Appropriations Committee, particularly in light of the fact that it plays a primary role in controlling the program's purse strings.

In an effort to help us get to the bottom of these allegations, I sent a series of questions to the Executive Office for United States Trustee last August. Copies of those questions and the answers, which were received yesterday evening, are included in your hearing materials.

It is my hope that today's hearing provides an opportunity for us to get to the bottom of these allegations. As you know, the Commercial and Administrative Law Subcommittee has primary jurisdiction for the program.

Accordingly, if there are any legislative reforms that we conclude are necessary as a result of today's hearing, I intend to recommend them to the full Judiciary Committee for consideration.

I very much look forward to today's hearing and to receiving testimony from all of our witnesses.

At this time, I would now like to recognize my colleague, Mr. Cannon, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. CANNON. Thank you, Madam Chair. I would like to submit my full written statement for the record, but make a couple of comments at the outset.

In the first place, we have talked in many of these hearings about how bankruptcy is complex, the fact that it is a maze, or can

be characterized as a maze, for a debtor is not inappropriate, given the benefits that come out of the process.

The question of our Committee is are we making reasonable requirements and how is that being implemented. It was my policy, as Chairman of this Committee, and it continues to be my policy in support of the Chair of this Committee, to assert our jurisdiction directly, and I think the nature of the Appropriations Committee and their actions, whatever they may be, are not well founded, because they don't have the understanding of the program that this Committee has.

So I find their conclusions remarkably unpersuasive and, to the degree they have drawn conclusions and wielded the political bat of an appropriation process, is not very meaningful to me and, in fact, I hope that what we do here is push back with clarity.

And that doesn't mean that I am taking any side on this issue, and we have worked very hard to come to a balance in the Reform Act, and I want to know if those things work.

We had questions on both sides of the aisle, bipartisan, and it is complex. And so I think the point is what is working and what is not working and how do we make it better. And to the degree that the appropriators disagree, let's help them get educated on the issue.

Thank you, Madam Chair. I yield back.

Ms. SÁNCHEZ. I thank the gentleman for his opening statement.

Without objection, other Members' opening statements will be included in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing at any point.

I am now pleased to introduce the witnesses for today's hearing. Our first witness is Clifford White, III. Mr. White is the director of the Executive Office for United States Trustees. He has served in the Federal Government for 27 years, including previous service as an assistant United States Trustee and a deputy assistant attorney general within the Department of Justice, and as assistant general counsel at the U.S. Office of Personnel Management.

Mr. White was recognized with a Presidential Rank Award for Meritorious Executive in 2006 and the Attorney General's Award for Distinguished Service in 2003.

Welcome, Mr. White.

Our second witness is the Honorable Jay Cristol. In 1985, after 25 years of law practice, Judge Cristol left his position as senior partner in a firm he founded to accept an appointment to the Federal bench. He serves as chief judge emeritus in the southern district of Florida.

Prior to his appointment, he served as Special Assistant Attorney General of Florida during the 1959, 1961, 1963 and 1965 sessions of the Florida legislature. Judge Cristol is an adjunct professor, teaching at the University of Miami School of Law.

Welcome to you.

Our third witness is the Honorable Eugene Wedoff. Judge Wedoff was appointed for a 14-year term of office and continues to serve the bankruptcy court of the northern district of Illinois. He is the co-chair of the American Bankruptcy Institute's Consumer Bank-

ruptcy Committee and the associate editor of the *American Bankruptcy Law Journal.*

We want to welcome you.

Our fourth witness is Paul Uyehara. Mr. Uyehara is a senior staff attorney in the Language Access Project of Community Legal Services, Incorporated of Philadelphia, where he focused on language rights advocacy, improving program accessibility for language minority clients and representing limited English proficient clients with consumer problems, particularly mortgage foreclosure and bankruptcies.

Mr. Uyehara has over 25 years of experience at Philadelphia Legal Assistance, CLS and Delaware County Legal Assistance, both as a paralegal and a lawyer. Mr. Uyehara also worked as an assistant city solicitor for the city of Philadelphia and a law clerk in the Federal district court.

Thank you for being here.

Our final witness is Mary Powers, the rose among our panel. Ms. Powers is a former trial attorney for the Department of Justice, Office of the United States Trustee. In that capacity, she reviewed cases for bankruptcy fraud and abuse, drafted motions, pleas and briefs in connection with presentation and litigation of cases under the bankruptcy code and conducted hearings and trials.

Prior to that position, Ms. Powers was in private practice, representing debtors, creditors and credit committees in all aspects of bankruptcy proceedings.

Thank you all for your willingness to participate in today's hearing. Without objection, your written statements will be included in their entirety into the record. So we are going to ask that you limit your oral statements to 5 minutes.

You will note that we have a lighting system. When your time begins, the light will turn green. When you are 4 minutes into your testimony, the light will turn yellow as a warning that you have a minute to wrap up your testimony and, at the end of the 5 minutes, the light will turn red, warning you that your time has expired.

If you are mid-sentence when your light turns red, please feel free to complete your final thought, so that we may move on to our next witness.

After each witness has had an opportunity to present his or her testimony, Members of the Subcommittee will be permitted to ask questions, subject to the 5-minute limit.

So with the ground rules underway, I am going to invite Mr. White to begin.

TESTIMONY OF CLIFFORD J. WHITE, III, DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, UNITED STATES DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. WHITE. Thank you, Madam Chairwoman, Ranking Member Cannon, Members of the Subcommittee. I thank you for the opportunity to discuss the activities of the U.S. Trustee Program.

We are the component of the Justice Department with the responsibility, with the mission, of both the integrity and the efficiency of the bankruptcy system. Over the past 2 years, our focus has been on implementing substantial new responsibilities given to

the program by the Congress under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

In performing our duties, we are guided by a simple principle—to faithfully carry out the law, as written by the Congress, and to do so with prudence, with discretion and with sound legal judgment.

We balance many factors in every case. We vigorously enforce the law, but we recognize that not every technical violation merits an enforcement action. We work to combat fraud and abuse committed by debtors, as well as violations committed against debtors who are vulnerable to exploitation because of their financial situation.

One of our major challenges is the litigation of issues of first impression. It is our duty to clarify the many new and sometimes complex provisions of BAPCPA by bringing issues before the bankruptcy and the appellate courts to promote the coherent, the uniform and the prompt development of case law.

Another important and continuing part of our strategy that makes the new law work effectively has been an enormous outreach effort with other constituencies in the bankruptcy system. We have regularly consulted with Government agencies, consumer advocates and debtor bar, creditor organizations, private trustees, the courts and others to gain a broader perspective on our new duties.

Objective evidence demonstrates that we are achieving our mission and this is due to the extraordinary efforts of the staff of the U.S. Trustee Programs around the country.

My testimony outlines our activity in a number of areas. Let me now, if I may, highlight just three here.

First, means testing. BAPCPA requires means testing to determine if debtors with incomes above their State median have sufficient disposable income to repay all or part of their debt. Chapter 7 cases of those who have the ability to repay are deemed or presumed abusive.

The U.S. Trustee is required to file a statement indicating if a case is presumed abusive and, if it is, then we must file a motion to dismiss or an explanation of why we are not filing a motion.

Data compiled thus far show that only about 9 percent of chapter 7 debtors are subject to the complete means test. Of those, only about one out of ten is presumed abusive under the statutory formula.

Significantly, the U.S. Trustee declines to file a motion to dismiss in about 30 percent of all presumed abuse cases that don't voluntarily convert or dismiss. Reasons for declination include loss of employment or continuing high medical expenses, among other reasons, and we prevail in 97 percent of the cases in which we seek dismissal.

Thus, the U.S. Trustee Program, I would suggest, has successfully enforced the new means testing law, but has done so with discretion and with restraint.

Second, the new law requires the U.S. Trustees to approve qualified credit counselors who are authorized to issue certificates that debtors must obtain prior to filing for bankruptcy.

As confirmed in a report issued last April by the Government Accountability Office, the U.S. Trustee Program has put into place an

effective mechanism to screen applicants to ensure that only qualified counseling agencies are approved. Those agencies have adequate capacity to serve debtors in a timely fashion, and they waive or they reduce the standard $50 fee in about one out of every three cases.

In addition, we are making much progress in serving limited English proficient debtors. Credit counseling services are available in about 150 languages by telephone and in many languages at more than 350 in-person locations.

Third, in chapter 11 cases, we also have new responsibilities in many areas that are designed to enhance the accountability of management of bankrupt companies. Among other things, we enforce the new section 503(c), which restricts the ability of companies to pay bonuses to senior executives through key employee retention plans.

Through the beginning of August, we filed approximately 40 objections to executive bonus plans and have prevailed in almost 70 percent of these cases. In addition, we have successfully negotiated with debtors and modified compensation schemes to avoid an objection even before the bonus plan is filed.

The U.S. Trustee Program, we suggest, has compiled a substantial record of accomplishment. Compliance with the new law has presented significant challenges to the U.S. Trustees, to debtors, to creditors, attorneys and others.

The entire bankruptcy system is in a time of transition. The program will continue its efforts to work cooperatively with all components of the system to satisfy our obligations to enforce and implement the law with fairness, with efficiency and effectiveness, for the benefit of all stakeholders.

I would be happy to answer any questions you may have.

[The prepared statement of Mr. White follows:]

PREPARED STATEMENT OF CLIFFORD J. WHITE, III

Madam Chairman, Ranking Member Cannon, and Members of the Subcommittee:

Thank you for the opportunity to appear before you today to discuss the activities of the United States Trustee Program (USTP or Program). We are the component of the United States Department of Justice whose mission it is to promote the integrity and efficiency of the bankruptcy system.[1] Our duties, which are set out primarily in titles 11 and 28 of the United States Code, range from consumer bankruptcy cases to large corporate reorganizations.

Over the past two years, our focus necessarily has been on implementing the substantial new responsibilities given to the Program by the Congress in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). We are now responsible, for example, for conducting a more transparent and objective test to determine a consumer debtor's eligibility for chapter 7 relief, scrutinizing applications by credit counselors and debtor educators to ensure that only qualified providers are approved to offer these services to debtors, supervising audits of chapters 7 and 13 cases, and enforcing new provisions to hold corporate managers more accountable after their companies file for bankruptcy relief. These have been daunting tasks, but objective evidence suggests that we are meeting the challenges. We understand that our work to effectuate the BAPCPA is far from over, and every day we strive to refine our efforts and to improve upon our performance for the benefit of all stakeholders in the bankruptcy system.

[1] The USTP has jurisdiction in all judicial districts except those in Alabama and North Carolina. In addition to specific statutory duties and responsibilities, United States Trustees "may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title." 11 U.S.C. § 307.

In carrying out the BAPCPA and other statutory mandates, the Program is guided by a simple principle: to faithfully carry out the law as written by Congress, and to do so with prudence, discretion, and sound legal judgment. We balance many factors in every case and, while we vigorously enforce the law, we recognize that not every technical violation merits an enforcement action. Further, we work to combat both fraud and abuse committed by debtors, as well as violations committed against debtors who are vulnerable to exploitation because of their financial situation.

One of the major challenges we have faced has been the litigation of numerous cases on issues of first impression. It is our duty to help clarify the many new and complex provisions of the BAPCPA by bringing issues before the bankruptcy and appellate courts to promote the coherent, uniform, and prompt development of case law.

The Program's success in fulfilling the broad responsibilities assigned to it in the BAPCPA is a result of the extraordinary efforts of staff in the Executive Office and in our field offices. Prior to the effective date of the BAPCPA, teams of employees from around the country were assembled to develop policies and procedures to ensure the effective and efficient implementation of the new law. These teams also conducted comprehensive training for all employees in the Program, as well as for the private trustees and members of the bar. As we retooled our internal operations, we engaged in an enormous outreach effort with other constituencies in the bankruptcy system. We have regularly consulted with government agencies, the consumer bar, consumer advocates, creditor organizations, the courts, and others to gain a broader perspective on our new duties. Both internal analyses and external outreach are a continuing part of our strategy to enhance our ability to make the BAPCPA work for all stakeholders in the bankruptcy system.

The following highlights some of the most significant activities of the Program over the past year.

CIVIL ENFORCEMENT, MEANS TESTING, AND CONSUMER PROTECTION

Civil Enforcement

One of the core functions of the USTP is to combat bankruptcy fraud and abuse. This is reflected both in our statutory mandate and in our track record over the past 20 years. In launching a Civil Enforcement Initiative in 2002, the Program adopted a balanced approach to address wrongdoing both by debtors and by those who exploit debtors. The Program combats fraud and abuse by debtors by seeking denial of discharge for the concealment of assets and other violations, by seeking case dismissal if a debtor has an ability to repay debts, and by taking other enforcement actions. We protect consumer debtors from wrongdoing by attorneys, bankruptcy petition preparers, creditors, and others by pursuing a variety of remedies, including disgorgement of fees, fines, and injunctive relief.

In the first three quarters of Fiscal Year (FY) 2007, the Program took more than 55,000 civil enforcement and related actions, including actions not requiring court resolution, with a monetary impact of more than $651 million in debts not discharged, fines, penalties, and other relief. Since we began tracking our results in 2003, we have taken more than 270,000 actions with a monetary impact in excess of $3.2 billion.

Means Testing

A major new aspect of our civil enforcement efforts is the implementation of the means test that was established under the bankruptcy reform law. The new section 707(b) and other provisions replaced the former subjective "substantial abuse" standard with more transparent and objective criteria to determine whether a case is "presumed abusive" and potentially subject to dismissal. Under the means test, all individual debtors who have above median income are subject to a statutorily prescribed formula to determine disposable income. The formula is partially based on allowable expense standards issued by the Internal Revenue Service for its use in tax collection. The primary purpose of the means test is to help determine eligibility for chapter 7 bankruptcy relief.

The Judicial Conference of the United States promulgated the official means test forms that debtors are required to complete. It is important to note that the means test calculation of disposable income applies only to debtors with income above their state median level. For more than 90 percent of chapter 7 debtors and nearly three-quarters of chapter 13 debtors, the means test is abbreviated to an income calculation without consideration of expenses.

The BAPCPA requires the United States Trustee to file a statement with the court within 10 days after the section 341 meeting of creditors indicating if the case is "presumed abusive" under the statutory formula. Within 30 days thereafter in

"presumed abusive" cases, the United States Trustee is required to file either a motion to dismiss or a statement explaining why filing such a motion would not be appropriate. We have endeavored to implement these mandates in a manner that allows us to identify cases of abuse and also to exercise our discretion to ensure that dismissal is sought only in meritorious cases.

Between October 1, 2006, and June 30, 2007, approximately nine percent of chapter 7 debtors had income above their state median. Of those cases filed by above median income debtors, approximately 10 percent were "presumed abusive." However, after consideration of special circumstances, such as a job loss, reduction in income, or medical condition, we exercised our statutory discretion to decline to file motions in about 30 percent of the "presumed abusive" cases that did not voluntarily convert or dismiss.

Despite the high rate of declinations, we are filing motions to dismiss at nearly three times the rate prior to enactment of the BAPCPA. Notably, the United States Trustee has prevailed in nearly 97 percent of the cases that were either adjudicated by the bankruptcy court or voluntarily dismissed or converted under the "presumed abuse" standard contained in 11 U.S.C. § 707(b)(2). For example, in a recent case in the Northern District of Texas, an investigation by the United States Trustee's office revealed that a married couple had under-reported their income by more than $5,000 per month and had over-reported their mortgage expense. When the means test was adjusted to align with the facts, it reflected that the debtors had over $1,000 per month in disposable income, as opposed to the minus $18 they had initially claimed. In response to the United States Trustee's motion to dismiss, the debtors converted their case to chapter 13 and will repay nearly $62,000 to unsecured creditors.

It is important to note that even if a case is determined not to be "presumed abusive" under the means test calculation, the reform law does not preclude the USTP from taking action when it finds it to be abusive under a "totality of the circumstances" or bad faith analysis. The following examples illustrate this point.

- Despite annual income exceeding $125,000, a debtor in the Western District of Washington attempted to discharge $642,181 in unsecured debt in order to retain what he described as his $810,000 "dream home" with a $7,200 monthly mortgage payment. Although the case was not "presumed abusive" under the means test because his large monthly payments to secured creditors reduced his current monthly income, the United States Trustee successfully argued for dismissal under the totality of the circumstances of the debtor's financial situation.
- The United States Trustee obtained case dismissal for bad faith against debtors in the District of Massachusetts who earned nearly $10,000 per month; owned real estate valued at almost $1 million; and owned or leased a Jaguar, a Mercedes Benz, and a vintage 1965 Mustang. They incurred significant debt on numerous credit cards to purchase luxury goods and withdrew large cash advances against the cards within one year before filing bankruptcy. The dismissal prevented the chapter 7 discharge of $300,775 in unsecured debt.

Congress mandated that the Director of the Executive Office report on the impact of the use of the IRS standards in the means test calculation. The Program contracted with the RAND Corporation to collect data and to perform related research. Based on that research, in July of this year, the Program issued its report to the Congress. The most significant finding was that the IRS standards generally allow chapter 13 debtors to deduct expenses in an amount above their actual expenses, with the greatest advantage realized by above median chapter 13 debtors with lower income. The IRS standards allow above median debtors, on average, $490 in expenses above the amount that debtors report they actually spend. As income rises, the differential becomes smaller. This means that the IRS standards have a progressive impact on above median debtors, such that those with lower income are treated more favorably than those with higher income. Further research using a larger sample size is necessary to determine any long-term trends. Unfortunately, the inability to extract data electronically from court forms necessitates the use of manual data entry, which makes further research cumbersome and expensive.

Consumer Protection

An important component of the Program's civil enforcement efforts has been to protect consumer debtors. These enforcement efforts often involve actions against debtors' counsel, non-attorney bankruptcy petition preparers (BPPs), or other third parties. In the first nine months of FY 2007, the Program took 394 formal actions against debtors' counsel and 184 actions against petition preparers.

Among the most egregious schemes are those perpetrated upon consumers facing foreclosure on their homes. In a recent case in the Western District of Pennsylvania, the bankruptcy court entered a default judgment against a BPP following an adversary proceeding filed by the Office of the United States Trustee. The out-of-state BPP contacted several Pittsburgh area residents faced with foreclosure by mailing a postcard which guaranteed the BPP could help them keep their homes. In exchange for fees ranging from $250 to $2,100, the BPP provided the homeowners with skeletal chapter 13 petitions to file to stay foreclosure. The debtors' bankruptcy cases were ultimately dismissed. The court fined the BPP $72,000, ordered the disgorgement of fees in the amount of $8,200, and permanently enjoined it from acting as a BPP and offering legal advice or otherwise engaging in the unauthorized practice of law in the district.

Regrettably, debtors sometimes are also exploited by their bankruptcy lawyers. In a recent case in the District of Rhode Island, the bankruptcy court approved an order in which a debtor's attorney consented to a 36-month suspension from the practice of bankruptcy law and agreed to disgorge $2,726 in fees to three former clients. The order resulted from an investigation by the United States Trustee's Providence office into numerous complaints that the attorney engaged in professional malfeasance when handling consumer bankruptcy cases.

The Program also has a duty to redress violations by creditors, particularly when the abuse is systemic or multi-jurisdictional. In many cases, creditor abuse is best addressed by the private case trustees we appoint who object to claims, or by debtors' lawyers who dispute loan agreement terms. But sometimes, the integrity of the system as a whole is at stake, and it is important for the Program to take direct enforcement action.

In one ongoing case in the Southern District of Texas involving the conduct of a large national mortgage servicer and its counsel, the Program has invested substantial resources. USTP attorneys deposed more than 20 witnesses, reviewed nearly 10,000 pages of documents, and completed five full days of trial. In another case, the bankruptcy court sanctioned the law firm of that same national mortgage servicer for making inaccurate representations to the court. In his opinion, the bankruptcy judge noted that creditor's counsel "complained bitterly about the participation of the U.S. Trustee in this matter." The court concluded, however, that the United States Trustee's participation "assured presentation of a complete factual and legal case" and "provided an invaluable benefit to the case and to the process by his professional participation."

The Program also has been active in enforcing 11 U.S.C. § 363(o), which is a less publicized consumer protection measure added under the BAPCPA. Section 363(o) prohibits bankrupt lenders from selling loan portfolios or other interests "free and clear" of the rights of their customers to assert claims or defenses provided under the Truth in Lending Act or other consumer protection laws. The United States Trustee's role to enforce section 363(o) is paramount because consumer borrowers may not receive notice of the intended sale of their loans. Even if they receive notice, they may not have the financial means to object to the sale or request the sale provisions contain section 363(o) safeguards to preserve their rights. To date, United States Trustees have filed pleadings to enforce section 363(o) in at least a dozen cases in which bankruptcy sales by lenders did not provide the required and appropriate consumer protection.

The BAPCPA created 11 U.S.C. §§ 526–528 to protect consumer debtors by regulating the conduct of debt relief agencies (DRA), as defined in the Bankruptcy Code, that provide bankruptcy-related services. Approximately 20 cases have raised statutory challenges to the DRA provisions, including challenges to the application of the provisions to attorneys, to the requirement that a DRA provide certain written disclosures to consumer debtors, to the constitutionality of the prohibition on advising debtors to incur additional debt in contemplation of filing bankruptcy, and to the constitutionality of the required disclosure in advertisements touting bankruptcy assistance.

The Program has worked closely with the Department's Civil Division, which has taken the lead in defending the DRA provisions in cases brought in United States bankruptcy and district courts. The majority of these cases have been resolved, with several cases being dismissed. Appeals are pending in the Second, Fifth, Eighth, and Ninth Circuits, all of which involve constitutional challenges. In addition, arguments on similar issues have been fully briefed in two district court cases.

CRIMINAL ENFORCEMENT

Criminal enforcement is another key component of the Program's efforts to uphold the integrity of the bankruptcy system. We recently issued our first annual report

to the Congress on criminal referrals by the Program. We reported that in FY 2006, the Program made 925 bankruptcy and bankruptcy-related criminal referrals. We are on track to exceed that number for FY 2007.

Under the leadership of our Criminal Enforcement Unit (CrEU), consisting primarily of career federal prosecutors, we have enhanced the Program's work in this critical area. The CrEU has conducted extensive training for federal prosecutors and law enforcement personnel, USTP staff, private trustees, and others; published internal resource documents and a training video for use by Program personnel involved in the criminal referral process; and established a bankruptcy fraud Internet "hotline" that became operational at the beginning of FY 2007. In addition, approximately 25 of the Program's attorneys have been cross-designated as Special Assistant United States Attorneys to assist in the prosecution of bankruptcy fraud.

The following examples demonstrate the wide array of bankruptcy fraud prosecutions that address both debtor fraud and criminal violations by those who exploit debtors:

- On April 13, 2007, in the District of Minnesota, husband and wife debtors were convicted on eight counts and nine counts, respectively, including false declaration in bankruptcy, concealment of assets, and money laundering. In their bankruptcy case, the couple did not disclose their interests in an Individual Retirement Account (IRA) and substantially understated the value of their house. When the chapter 7 trustee discovered the IRA, valued at approximately $208,000, the debtors liquidated the asset, cashed the check, and concealed the cash from the trustee. After the trustee learned of the true value of the debtors' interest in their house, the house burned down and the couple received a check for the insurance proceeds from the loss. The debtors cashed the check, which was property of their bankruptcy estate, and carried $244,535 in currency from the bank. The insurance proceeds have not been recovered by the trustee. The United States Trustee's Minneapolis office referred the case and assisted in the investigation, and a member of CrEU assisted in the preparation of the indictment.
- A "foreclosure rescue" operator was sentenced on August 8, 2007, in the District of Arizona to 33 months in prison, fined $5,000, and ordered to pay $86,409 in restitution, based on his guilty plea to two counts of false declaration in bankruptcy. The operator sought out individuals who were losing their homes to foreclosure and prevailed upon them to transfer their homes to him to avoid having a foreclosure on their credit reports. To stay foreclosure, he filed bankruptcy petitions in the homeowners' names without their knowledge. While the cases were pending, he collected rental income on the properties. The United States Trustee's Phoenix office referred the matter, conducted the investigation, and provided assistance to the United States Attorney's office.

CREDIT COUNSELING AND DEBTOR EDUCATION

One of the key elements of the bankruptcy reform law is financial education. Individual debtors must now receive credit counseling prior to filing and education on personal financial management prior to discharge. These new requirements are designed to ensure that debtors know what their options are before entering bankruptcy and have the tools to avoid future financial catastrophe when they exit bankruptcy.

The primary responsibility of the United States Trustees is to approve providers who meet statutory qualifications to offer credit counseling and debtor education services to debtors. In light of the troubled history of the credit counseling industry, our priority was to design an application screening and approval process that would protect debtors from unscrupulous providers. We developed our approval and monitoring criteria with assistance from the Internal Revenue Service and the Federal Trade Commission.

There are currently 161 approved credit counseling agencies and 297 approved debtor education providers. Approximately 41 percent of all initial credit counseling applications and 28 percent of initial debtor education applications were either rejected or withdrawn. In recent months, the Program launched a schedule of on-site Quality Service Reviews. This mechanism for post-approval monitoring will permit the Program to interview provider staff, review records on-site, and observe counseling sessions. These reviews will strengthen the Program's efforts to ensure that debtors receive quality services from approved providers.

Approximately 37 percent of debtors receive credit counseling by telephone, 52 percent by Internet (which also may have a telephone component), and 11 percent in person. From October 1, 2006, to June 30, 2007, credit counseling agencies issued

801,024 counseling certificates. Interestingly, during the first nine months of FY 2007, approximately 14 percent fewer bankruptcy cases were filed than credit counseling certificates were issued. We will need time series data to determine if this difference is probative of the question of whether credit counseling is assisting debtors in identifying alternatives to bankruptcy.

Another ongoing concern of the Program is the provision of credit counseling and debtor education for limited English proficient debtors. The Program has approved two national providers that offer interpreter services without charge to their clients in more than 150 languages. In addition, other approved national and local providers offer Internet, telephonic, or in-person counseling in a total of 30 languages. Approved providers are required to report to the Program on their language capabilities, and the USTP Web site provides information on the language capability of all providers on a district-by-district basis.

The USTP also monitors compliance with the Congressional mandate that approved providers offer services without regard to a debtor's ability to pay. Available information suggests that fees charged for services appear to be reasonable and that providers are waiving or reducing fees in appropriate cases. Fees charged by credit counseling agencies and debtor education providers generally are about $50. Fees are waived by credit counseling agencies in 15 percent of all cases, and are offered at a reduced rate in about another 14 percent of the cases. Similarly, debtor education providers are waiving fees in 14 percent of cases and reducing fees in approximately 21 percent of cases. This means that about one out of every three debtors is receiving the required counseling and education services at no cost or at a reduced cost.

In a report issued in April 2007, the Government Accountability Office (GAO) credited the Program with developing a comprehensive, timely, and effective process for the approval of eligible credit counselors and debtor educators. GAO found few issues with the competence, integrity, and performance of providers approved by the USTP. Additionally, GAO found that debtors receive services within a reasonable time frame and at a reasonable fee that is waived for inability to pay. GAO did make two recommendations for further action which the Program endorses.

- The USTP should "develop a mechanism that would allow the Program or other parties to track outcomes of prefiling credit counseling, including the number of individuals issued counseling certificates who then file for bankruptcy." In addition to refining efforts already made in comparing certificates with bankruptcy filings, we also will pursue recommendations made in a recent report prepared for the Program by the RAND Corporation. Among others things, RAND recommended that we develop outcome measures based upon results from the Quality Service Reviews of approved providers that we began to conduct this year. The scope and timeliness of our research may be determined, in part, by our level of appropriations in FY 2008.
- The Program should "issue formal guidance on what constitutes 'ability to pay' . . . [and] examine the reasons behind the significant variation among providers in waiving fees." We are preparing formal fee waiver guidance in a rulemaking which we hope to issue for public comment in the near future. We also will collect and analyze data from providers so that we can enhance our ability to compare the number of fee waivers granted by providers and the criteria they used in making their decisions.

Section 105 of the BAPCPA requires the Program to develop and evaluate the effectiveness of a financial management training curriculum and materials. After consulting with a wide range of individuals who are experts in the field of debtor education, including chapter 13 trustees, a curriculum was developed and pilot tested. The study is nearing completion and a report will be submitted to Congress by the end of this calendar year.

DEBTOR AUDITS

The BAPCPA mandated a new regimen of debtor audits for consumer cases filed on or after October 20, 2006. Audits must be conducted in at least one out of every 250 consumer cases filed in a judicial district, and in cases where income or expenses deviate from a statistical norm. Each audit will verify the accuracy of the financial information provided in a debtor's schedules and statement of financial affairs. The audits are designed to assist the Program in identifying cases of fraud, abuse, and error; to enhance deterrence; and to provide baseline data to gauge the magnitude of fraud, abuse, and errors in the bankruptcy system.

In FY 2007, the USTP contracted with six accounting firms to perform the audits. By statute, debtors are required to cooperate with the auditors, and a debtor's discharge may be revoked for failing to adequately explain either a lack of cooperation

with the auditor or a material misstatement reported by the auditor. Before an audit firm reports a material misstatement, it is required to offer the debtor an opportunity to provide a written explanation. The Program also is required to report annually to Congress on the results of the audits.

As of August 31, 2007, 3,344 cases had been selected for audit and 2,575 audits had been concluded. There are three potential outcomes for a debtor audit: (1) no material misstatements reported, (2) at least one material misstatement reported, or (3) issuance of a report of no audit. About 27 percent of the audits concluded thus far have identified at least one material misstatement, and an additional 10 percent were closed without audit completion generally because the debtor did not respond to the audit notification letter, the debtor did not provide a sufficient response to the audit firm's request for information, or the case was dismissed before a sufficient response was received.

When a debtor audit identifies a material misstatement, the Program reviews the case to determine if enforcement action is appropriate. In a recent case in the Eastern District of California, an audit revealed that a debtor had under-reported several bank and financial accounts, and had failed to disclose pre-petition transfers to insiders and creditors. Based on these facts, the United States Trustee's Sacramento office filed a complaint against the debtor, who agreed to forego the discharge of $4.2 million in unsecured debt rather than proceed to trial.

CHAPTER 11 ISSUES

The Program carries out significant responsibilities in business reorganization cases. These responsibilities include such matters as the appointment of official committees of creditors and equity security holders, objections to the retention and compensation of professionals, the review of disclosure statements, and the appointment of trustees and examiners where warranted. The BAPCPA reformed chapter 11 practice in many important respects, including the imposition of new deadlines for reorganization in small business cases; the USTP appointment of privacy and patient care ombudsmen to protect the rights of customers, patients, and other third parties affected by chapter 11 cases; and the addition of other requirements to enhance management accountability. Because business reorganization cases often raise highly complex questions of law and require sophisticated financial analysis, such cases can be time intensive for United States Trustee staff.

In the first nine months of FY 2007, the Program filed 1,717 motions to convert or dismiss chapter 11 cases. The grounds for such motions often involved debtors' failure to file financial reports or debtors' dissipation of estate assets without a reasonable likelihood of rehabilitation. In addition, the Program filed objections to professional fees in 460 cases and obtained nearly $17 million in fee reductions. An additional $11 million in reductions in 578 cases were obtained through out-of-court resolution. It is not possible to calculate other reductions voluntarily taken by professionals on account of USTP scrutiny of compensation applications.

One recent case illustrates the USTP's role in the review of professional compensation. In the case of Northwest Airlines in the Southern District of New York, debtor's counsel was paid $35.5 million and requested an additional bonus of $3.5 million due to "exceptional results achieved, the quality of work performed and the efficiency with which the services were rendered" in the case. The Program, along with the flight attendants' union and a former member of the Ad Hoc Committee of Certain Claims Holders, objected to the success fee. The United States Trustee argued that debtor's counsel was well compensated at market rates and provided no specific evidence of exceptional results that were not adequately compensated by such rates. The court ruled that the requirements for a fee enhancement were not met and denied the success fee.

The Program also reviews applications for the retention of professionals to ensure compliance with section 327 conflict of interest prohibitions. During FY 2007, three courts of appeals upheld objections by the USTP to the proposed retention of professionals who had interests adverse to the estate, were not disinterested, or failed to disclose connections that created potential and actual conflicts of interest.

Another recent case demonstrates the important role of the United States Trustee when management does not properly exercise its fiduciary obligations to the estate and comply with the law. The United States Trustee's Brooklyn office sought dismissal of a chapter 11 case due to the debtor's failure to provide proof of insurance, cooperate with the United States Trustee, meet disclosure and financial reporting obligations, and otherwise demonstrate an ability to reorganize. On the date the debtor filed its bankruptcy petition, it owned an apartment building that had more than 1,400 uncorrected housing code violations and was about to be sold through a HUD regulatory foreclosure. The United States Trustee's motion to dismiss the

case was supported by HUD, the City of New York, and an informal committee of tenants. The Bankruptcy Court for the Eastern District of New York dismissed the case on September 6, 2007, with a six-month bar to refiling a bankruptcy petition. The bar to refiling will allow HUD to proceed with the foreclosure and transfer the property to a responsible owner who will cure the housing code violations.

As noted, the BAPCPA added numerous provisions designed to enhance management accountability and to provide greater protections to creditors, shareholders, and the public. For example, Congress added section 1104(e) to the Bankruptcy Code, which requires the United States Trustee to seek to oust management if there are "reasonable grounds to suspect" that current management participated in fraud, dishonesty, or other criminal acts in the debtor's management or public financial reporting. In addition, corporate debtors are under stricter time deadlines to confirm a plan of reorganization. Under new 11 U.S.C. § 503(c), companies are also restricted in their ability to pay bonuses to senior executives through Key Employee Retention Plans (KERPs). Since enactment of section 503(c) through the beginning of August 2007, United States Trustees have filed approximately 40 objections to executive bonus plans and have been successful in almost 70 percent of these cases. This number does not include additional instances where the United States Trustee persuaded the debtor to modify its compensation scheme to avoid an objection. Moreover, 11 U.S.C. § 1112(b) was amended to lessen the court's discretion to refuse to order conversion of a case to chapter 7 if the debtor is not expeditiously reorganizing in accordance with the commands of chapter 11.

Two cases illustrate our actions to carry out the new chapter 11 provisions:

- In the New Century TRS Holdings, Inc., subprime mortgage lending case, the United States Trustee invoked section 1104(e) and filed a motion for the appointment of a trustee. As grounds, the motion cited New Century's admitted inability to stand behind its SEC financial filings and substantial issues about its internal financial controls. While the court acknowledged that the United States Trustee had raised serious concerns, the court granted alternative relief by ordering the United States Trustee to appoint an examiner to investigate the circumstances surrounding New Century's inaccurate public financial filings. When New Century later acknowledged that it could not stand behind its filings for a prior year, the court, at the United States Trustee's request, expanded the investigation to encompass that year as well.
- In the case of Malden Mills, the debtor, having failed to rehabilitate its business in a previous chapter 11 case, filed a new petition and immediately sought court approval of substantial bonuses for top management and others. The bonuses were payable upon the consummation by the debtor of a pre-negotiated sale of assets. Unsecured creditors were to receive nothing in the case, and most employees lost their jobs. The United States Trustee objected to the excessive bonuses, and the debtor withdrew the bonus proposal.

PRIVATE TRUSTEE OVERSIGHT

One of the core functions of the United States Trustees is to appoint and supervise the private trustees who administer consumer bankruptcy estates and distribute dividends to creditors. The Program also trains trustees, evaluates their overall performance, reviews their financial accounting, and ensures their prompt administration of estate assets.

In the first nine months of FY 2007, approximately 530,000 consumer and other non-business reorganization cases were filed under chapters 7, 12, and 13 of the Bankruptcy Code in the 88 judicial districts covered by the Program. The United States Trustees oversee the activities of the approximately 1,400 private trustees appointed by them to handle the day-to-day activities in these cases. With distributions by these trustees of about $7.9 billion last fiscal year, the Program's effectiveness in this area is critical. The Program has continued to strengthen its partnership with the private trustee organizations to address areas of mutual concern and enhance the operation of the bankruptcy system.

In implementing bankruptcy reform, the Program worked closely with the trustees and provided extensive training, with a particular focus on their new responsibilities with regard to serving as employee benefit plan administrators and the handling of debtor tax returns. We also have initiated the rulemaking process to issue uniform trustee final reports, which will enhance consumer bankruptcy case administration by improving access to case data and allowing for greater analysis of the bankruptcy system.

INFORMATION TECHNOLOGY EFFORTS

To the maximum extent possible, the USTP has leveraged its resources by utilizing information technology. In addition to enhancing existing automated systems that help manage caseloads and measure Program activity (e.g., the Automated Case Management System, Significant Accomplishments Reporting System, Criminal Enforcement Tracking System, and Professional Timekeeping System), the USTP has developed a number of new systems. These include a Means Test Review Management System, a Credit Counseling/Debtor Education Tracking System, a Credit Counseling/Debtor Education Certificate Issuance System, and a Debtor Audit Management System.

Notwithstanding the addition of these systems, the Program's ability to achieve efficiencies and maximize data collection has been hampered by an inability to electronically extract data from bankruptcy petitions and schedules. As suggested in Congressional Appropriations Committee Reports, we have been working with the Administrative Office of the U.S. Courts (AOUSC) for more than two years to have a data-enabled form standard made mandatory, subject to appropriate privacy and access concerns. "Data tags" in a data-enabled form permit the computer system to automatically extract and aggregate financial and other information from bankruptcy filings. Such forms would make the USTP's implementation of the new bankruptcy law vastly more time and cost efficient in several key areas such as calculating the means test to determine eligibility for chapter 7 relief and identifying cases for audit under statutory case selection standards. They would also save case trustees significant time and expense in the filing of final reports in hundreds of thousands of no-asset consumer cases where considerable new information is required under the BAPCPA. In addition, data tags could aid the courts in performing administrative functions and would assist policymakers and researchers in analyzing the effectiveness of the bankruptcy system (by, for example, providing better data on the relationship between medical expenses and bankruptcy filings). Discussions with the courts on this critical issue are continuing.

FISCAL YEAR 2008 APPROPRIATIONS REQUEST

The USTP is entirely self-funded through user fees paid by bankruptcy debtors. All revenues are deposited into the United States Trustee System Fund. The Program may expend funds as appropriated by Congress. In FY 2007, approximately 50 percent of the funding was derived from quarterly fees in chapter 11 reorganization cases. The balance of the funds was derived from filing fees paid in chapters 7, 11, 12, and 13, as well as interest earnings and miscellaneous revenues.

For FY 2007, Congress appropriated $223.1 million for the USTP. This amount provided funding for operations, including the Executive Office and 21 regions consisting of 95 field offices. The Program employs approximately 1,300 attorneys, financial analysts, and support staff. The USTP covers more than 300 sites where bankruptcy judges conduct proceedings and more than 450 administrative hearing sites (i.e., section 341 meeting rooms).

For FY 2008, the President requested appropriations of $231.9 million for the USTP. This amount would provide a current services budget. The Senate Appropriations Committee approved the President's budget. The House of Representatives passed legislation that would satisfy the President's request, subject to collections. The Program and the Department have re-estimated the level of receipts that are expected to be collected in 2008. The Attorney General has addressed the issue of the USTP funding in his appeal to the Appropriations Subcommittee, pointing out that the U.S. Trustee System Fund has a sufficient surplus to fully fund the FY 2008 request.

CONCLUSION

The United States Trustee Program has assembled a substantial record of accomplishment since enactment of the BAPCPA. Compliance with the comprehensive changes to the Bankruptcy Code has presented significant challenges to the United States Trustees, the courts, debtors, creditors, attorneys, and others. The bankruptcy system is in a period of transition. The USTP will continue its efforts to work cooperatively with all components of the system to satisfy our obligations to implement the law with fairness, efficiency, and effectiveness for the benefit of all stakeholders.

Ms. SÁNCHEZ. Thank you. Judge Cristol?

TESTIMONY OF THE HONORABLE A. JAY CRISTOL, JUDGE, UNITED STATES BANKRUPTCY COURT, SOUTHERN DISTRICT OF FLORIDA, MIAMI, FL

Judge CRISTOL. I am proud of the bankruptcy system of the United States and believe it is the most compassionate and, at the same time, most effective system in the world, because it goes beyond the archaic concept of looking only to the distribution of assets to creditors and offers an honest debtor a fresh start.

In answer to the question, "Watch dog or attack dog," the answer is the U.S. Trustee is not one dog. It is a pack of dogs. In the area of chapter 11 reorganization, the U.S. Trustee staff at local levels provide extremely valuable assistance to the courts.

In this area, the U.S. Trustee is a beloved Lassie or a Rin Tin Tin. Sadly, in the area of consumers, the U.S. Trustee is a pit bull. The problem comes from the top. Over the tenure of the past two directors, Lawrence Friedman and Clifford White, the policies sent from Washington to the soldiers in the field have made the U.S. Trustee program in the consumer area a pit bull.

I do not mean to make ad hominem attacks on Mr. Friedman or Mr. White. I respect them both as to integrity and professional talents. The problem is their perspective.

Mr. White's distinguished career has been served in the office of the Federal prosecutor. These gentlemen seem to view all debtors with a suspicion through prosecutorial eyes as dishonest crooks trying to beat the system and perceive debtors' lawyers as disreputable and untrustworthy.

Nothing is further from the truth. In my more than two decades on the bench, I have observed that almost all consumer debtors seeking relief in bankruptcy are honest, decent, hardworking citizens who suffered a catastrophic financial tragedy, seldom of their own making, such as a medical disaster and no health insurance, loss of employment, dissolution of a marriage or other financial misfortune.

Consumer lawyers who represent them are generally competent and well meaning, without blemish on their character.

The U.S. Trustee's most recent annual report boasts of the national civil enforcement initiative yielding millions in debts not discharged. There is a substantial difference between debts not discharged and debts collected. They offer no figures on debts collected.

The old adage, "You cannot get blood from a stone," is especially applicable here. Very little of the nondischarged debts are collected.

So what has been accomplished?

The report also claims that they have a better than 99 percent success rate in complaints filed against debtors. It fails to mention how many cases are won by default.

Think about it. A destitute, honest debtor that has appropriately turned over all of his or her property to the panel trustee, except for exempt property, which, in many States, is meager, is served with a lawsuit filed by the United States of America, represented by highly-skilled, well-paid lawyers.

In these circumstances, most debtors have neither the money nor the will to fight. In many instances, their remaining exempt property will not even cover the amount of a retainer to a competent

counsel. It is not Goliath against David. It is more like Goliath against an ant.

And what is the benefit to society of most of these undischarged debts or denials of discharge? Without discharge and the fresh start it provides, these victims of the initiative find it difficult to get a job, get credit, or climb out of the financial pit in which they are trapped.

They are denied a fresh start and the opportunity to re-enter society as productive citizens. The mean-spirited streak in the new law provides draconian penalties for the most minor and insignificant compliance failures of even unimportant matters. The U.S. Trustee seems to be enamored with these harsh penalties.

The new law makes it harder for consumers to save a home from foreclosure or a car from repossession, and the U.S. Trustee's policy seeks the harshest implementation of these provisions.

As a result, honest people, homeless or unable to drive to work. If a debtor's papers contain minor discrepancies that have no effect on the results of the case, there is no valid reason to persecute them.

The problems of consumer debtors are only exacerbated by the aggressive anti-consumer stance of the U.S. Trustee Program. The independent decisions of career personnel in local offices have been subordinated to central directives from a politicized central office.

While spending enormous resources pursuing minor document defects in papers filed by consumer debtors, the U.S. Trustee spends little or no time on creditor wrongdoing. The U.S. Trustee was supposed to be a neutral monitor of the system and, for many years, it was. That neutrality has been maintained in North Carolina and Alabama under the bankruptcy administration system.

A final sad example is my case *In re Jean Raul Petit-Louis*, a pauper. He did not own real estate. He did not own a car. He had no money and little more than the clothes on his back.

He lost his job and could not pay his rent in public housing. Upon getting back to work, he was in danger of eviction because of a few dollars of unpaid rent. He could only keep a roof over his head if the debt was paid, which he could not do, or if he was discharged.

Petit-Louis, Little Louis, could not speak English and could not obtain credit counseling in Creole, the language he understood. Of ten U.S. Trustee approved credit counselors in southern Florida, not one had a Creole-speaking counselor.

The U.S. Trustee had not carried out its statutory obligation to provide credit counseling in a meaningful way.

Nevertheless, the U.S. Trustee sought to bar Little Louis from bankruptcy release, and when I granted a waiver, which is allowed by the statute, the U.S. Trustee filed a lengthy motion to reconsider, followed by an appeal and a threat to Little Louis that the U.S. Trustee would appeal all the way to the Supreme Court.

So Little Louis gave up and voluntarily dismissed his case—another ant smashed by the unlimited resources of the pit bull doing good as it sees doing good.

I close with the words of Cicero, "We are not those who do evil in the name of evil, but heaven protect us from those who do evil in the name of good."

[The prepared statement of Judge Cristol follows:]

PREPARED STATEMENT OF THE HONORABLE A. JAY CRISTOL

My name is A. Jay Cristol. I am a United States Bankruptcy Judge in the Southern District of Florida. This is my 23rd year on the bench. I served as chief judge from 1993 to September 1999. Prior to my appointment to the bench I was a civilian lawyer for 25 years with an extensive bankruptcy practice and service as a trustee in bankruptcy.

I also served twenty years in the Reserve Judge Advocate Generals Corps where, among other assignments, I lectured in the Pentagon and elsewhere to lower ranking enlisted personnel and military legal assistance lawyers on financial management and bankruptcy.

I am proud of the bankruptcy system of the United States of America and believe it was intended to be the most compassionate and, at the same time, most effective system in the world because it goes beyond the ancient concept of looking only to the distribution of assets to creditors and offers the honest debtor a fresh start. When the 1978 Code and its amendments were enacted the bankruptcy judge was elevated from a referee in bankruptcy to pure judge status and the administrative tasks were ultimately transferred to the U.S. Trustee who should have been more accurately named the U.S. Bankruptcy Administrator.

The program worked well for many years under the directorships of Gerry Patchen and others.

In answer to the question, "Watch Dog or Attack Dog?" the answer is the U.S. Trustee is not one dog. It is a pack of dogs.

In the area of chapter 11 reorganizations the U.S. Trustee staff at local levels provides extremely valuable assistance to the Courts. In this area the U.S. Trustee is a beloved Lassie or a Rin Tin Tin. Sadly, in the area of chapter 7 and chapter 13 the U.S. Trustee program is a pit bull.

Let me be quick to say the local Assistant United States Trustees and their staffs are generally competent and understanding and the regional Assistant U.S. Trustees generally are the same. The problem, as I see it, comes from the top. As I mentioned, the program ran well when Gerry Patchen was Director. Over the tenure of the past two directors, Lawrence Friedman and Clifford White, the policies sent from Washington to the soldiers in the field have turned the U.S. Trustee program in the area of consumer debtors into the pit bull.

I do not mean to make *ad hominem* attacks on Mr. Friedman or Mr. White. I respect them both as to their integrity and professional talents. It should be noted that Mr. White was honored in 2006 with a Presidential Rank Award for Meritorious Senior Professional Service.

The problem, as I see it, is the perspective of Mr. Friedman and Mr. White, whose distinguished career has been served in the office of the Federal Prosecutor. These gentlemen seem to view all debtors with suspicion through prosecutorial eyes as dishonest crooks trying to beat the system and perceive debtor's lawyers as disreputable and untrustworthy

Nothing is further from the truth. In my more than two decades on the bench I have observed that almost all consumer debtors seeking relief in the bankruptcy court are honest, decent, hardworking citizens who suffered a catastrophic financial tragedy, seldom of their own making, such as serious medical disaster and no health insurance, loss of employment, dissolution of a marriage or some financial mistake or misfortune. The consumer lawyers who represent them are generally competent and well-meaning without blemish on their character.

Yes, there are a few bad apples in the barrel. Prior to the U.S. Trustee's much publicized "National Civil Enforcement Initiative" most of the bad apples were caught by the system. Some got away, just like things happen in all segments of our society.

The U.S. Trustee boasts in its Annual Reports of a small number of anecdotal success stories, most of which would have come to the same result without intervention by the U.S. Trustee. The total numbers boasted about are infinitesimal against the total numbers of bankruptcy filings.

Likewise, the U.S. Trustee reports of the initiative yielding "millions in debts not discharged." The most recent report for fiscal year 2005 speaks of yielding $583 million in debts not discharged. There is substantial difference between debts not discharged and debts collected. The U.S. Trustee offers no figures on debts collected. The old adage "You cannot get blood from a stone" is especially applicable here. Very little of the non-discharged debts are collected so what has been accomplished?

The report claims a better than 99% success rate in the 1112 complaints filed to deny or revoke discharge. It fails to mention how many cases are won by default.

Think about it. A destitute, honest debtor that has appropriately turned over all his or her property to the panel trustee, except for exempt property, which in many states is meager, is served with a lawsuit filed by the United States of America, represented by highly skilled, well-paid lawyers. In these circumstances most debtors have neither the money nor the will to fight. In many instances their remaining exempt property will not even cover the amount of a retainer to a competent attorney. It is not Goliath against David, it is more like Goliath against an ant.

And what is the benefit to society of most of these undischarged debts or denials of discharge? Without discharge and the fresh start it provides, these victims of the existing initiative find it difficult to get a job, get credit or climb out of the deep pit in which they are trapped. They are denied a fresh start and the opportunity to re-enter society as productive citizens.

The new law codified some useful procedures to assist panel trustees and the court in administering cases. The mean-spirited streak that permeates the new law provides draconian penalties for the most minor and insignificant failures to comply with the even unimportant statutory requirements. The U.S. Trustee is enamored of these harsh penalties and swings its

sword with a vengeance. When local U.S. Trustee lawyers follow some of the policies set by Washington, I sense a feeling of embarrassment by the U.S. Trustee's attorneys at what they have been directed to do. Some specific examples are:

Consumer bankruptcy attorneys have the experience of explaining the new requirements to prospective clients, only to have the clients go away discouraged, and never return. Debtors must obtain all "payment advices" for the 60 days before the bankruptcy is filed; they must obtain a tax return or transcript for the most recent year before the petition is filed; they must provide information on every penny of their income for the six months prior to when the petition is filed; they must provide bank statements to the trustee and evidence or other current income; they must attend a pre-petition credit counseling briefing, no matter how hopeless their situation and regardless or whether their problems were caused by imprudent credit decisions or unavoidable financial catastrophes; attorneys must complete numerous additional forms, including a six-page means test form that requires arcane calculations about which there are many different legal interpretations. According to the United States Trustee program, attorneys must also provide clients with pages and pages of so called "disclosures", many of which are either irrelevant to the client's case or inaccurate, which then requires much additional time spent explaining why they are irrelevant or inaccurate. U.S. Trustee policy sees no problem denying a debtor bankruptcy because their income calculated on the statutory method as the average over the last six months is too high when, in fact, the Debtor lost their job and their income is zero. But if an expenses element on the mean test is higher than the actual number, the U.S. Trustee's policy has the *chutzpah* to ignore the statutory calculation and wants to use the actual number.

The recent GAO report states that the credit counseling requirement is not serving its supposed purpose. Even the credit counselors report that only 2-3% of the prospective debtors they serve could even contemplate a debt management plan. The counseling requirement serves primarily as yet another barrier to bankruptcy, especially in those districts where judges have ruled that debtors, even those facing emergencies, cannot file their bankruptcy cases until the day after they receive the credit counseling briefing. Why not the same day?

If a debtor's papers contain minor discrepancies in the numbers, discrepancies that would have had no effect on the results of the case, the debtor should not be publicly accused, as they are now, of making "material misstatements." Such serious accusation should be reserved for cases in which the debtor's misstatement had a significant impact on how the case was administered. There is no valid reason for the U.S. Trustee to persecute debtors.

The new law makes it harder for consumers to save a home from foreclosure or a car from repossession and the U.S. Trustee policy seeks the harshest implementation of these provisions. Result: honest people become homeless. Families are broken up. The victims lose their jobs because they have no car to drive to work.

The problems of consumer debtors are only exacerbated by the aggressive anti-consumer stance of the United States Trustee program. The independent decisions of career personnel and

local offices have been subordinated to central directives from a politicized central office dedicated to serving the political interests of the administration - in this case by effectively becoming an arm of the administration's corporate backers in the financial services industry and trying to make bankruptcy as difficult and unattractive as possible. Spending enormous resources in going after minor document defects in papers filed by consumer debtors has done nothing to address the widespread fraudulent claims and charges of mortgage companies in bankruptcy and other creditor abuses. Most documents filed by debtors' attorneys are not as poorly and inaccurately prepared as the unsupportable documents filed in great profusion by creditors – yet the U.S. Trustee spends little or no time on creditor wrongdoing.

The U.S. Trustee was supposed to be a neutral monitor of the system and, for many years, it was. More recently, it seems to devote almost all resources to going after consumer debtors. They give great scrutiny to consumers' filings, but almost none to creditors' activities. The neutrality has been maintained in North Carolina and Alabama under the Bankruptcy Administration System under judicial control.

It appears that the U.S. Trustee sees its mission to deny people relief through bankruptcy. They file dismissal motions for minor defects, which makes things especially difficult for pro se debtors. The U.S. Trustee should be helping not hindering these people. Dismissal motions filed for things like credit counseling a few days early, or one or two missing pay stubs, when it is obvious that such omissions are of no significance.

A final sad example is my case *In re Jean Raul Petit-Louis*, a pauper. He did not own real estate. He did not own a car. He had no money and little more than the clothes on his back. He lost his job and could not pay his rent in public housing where he lived in a tiny apartment. Upon getting back to work he was in danger of eviction because of the few dollars of unpaid rent. He could only keep a roof over his head if the debt was paid, which he could not do, or if it was discharged. Petit-Louis ("Little Louie") could not speak English and could not obtain credit counseling in Creole, the language he understood. Of ten U.S. Trustee approved credit counselors in southern Florida not one had a Creole speaking counselor. The U.S. Trustee had not carried out its statutory obligation to provide credit counseling in a meaningful way. Instead of agreeing to a waiver of the requirement as allowed by the statute, the U.S. Trustee sought to bar Little Louie from bankruptcy relief and when I granted a waiver the U.S. Trustee filed a lengthy motion to reconsider followed by an appeal and a threat to Little Louie that they would appeal all the way to the Supreme Court. Eventually, Little Louie voluntarily dismissed his case. Although he maintained the Court had jurisdiction to grant relief, it became clear to him and his pro bono counsel that the U.S. Trustee would use its unlimited resources to continue litigating the dispute, even if it required litigating the issues all the way to the Supreme Court.

I have submitted a number of cases of similar actions by the U.S. Trustee against other Little Louies.

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I will close by warning Little Louie and other poor but honest debtors with the words of Cicero: *Fear not those who do evil in the name of evil but heaven protect us from those who do evil in the name of good.*

APPENDIX TO TESTIMONY
of
A. JAY CRISTOL
Chief Judge Emeritus
United States Bankruptcy Court
Southern District of Florida

Hearing on the United States Trustee Program:
"Watch Dog or Attack Dog?"

before the
Subcommittee on Administrative and Commercial Law
House of Representatives Judiciary Committee

October 2, 2007

Appendix to A. Jay Cristol Testimony

1. A. Jay Cristol cases:

In re Petit-Louis, 344 B.R. 696 (Bankr. S.D.Fla. 2005)
In re Petit-Louis, 338 B.R. 132 (Bankr. S.D.Fla. 2005)

Debtor spoke only Creole and no credit counseling was available at the time in Creole. UST filed motion to dismiss, arguing that debtor must obtain counseling in language he did not understand. Court denied dismissal and UST moved for reconsideration. Court again denied dismissal. Court stated: "The U.S. Trustee's disregard for non-English speaking residents seeking counseling in the Southern District of Florida, a district which the U.S. Trustee admits 'presents its own unique set of language issues', evidenced the failure of the Office of the U.S. Trustee to comply with its duties in determining whether counseling services are adequate in this district. If the U.S. Trustee fails to manage the bankruptcy counseling system in a non-discriminatory fashion, the Court has the authority and indeed the responsibility to allow a debtor access to the bankruptcy system by waiving a requirement which, in practice, is inappropriately excluding him on the basis of his lack of English language ability."

In re Morgan, 2007 WL 2298010 (Bankr. S.D.Fla. 2007)

The debtor performed "means test" calculation, taking the housing ownership expense deduction for his residence which was free and clear of all liens and encumbrances. Chapter 13 trustee objected to above-median-income debtor's proposed plan, as failing to satisfy "projected disposable income" test. The Court held the debtor is allowed a deduction for the mortgage/rental expense. "The plain meaning of the statute and its use of the term "applicable" instead of "actual" evidences Congress' intent to set the Local Standards as a fixed allowance rather than a cap. The Court must assume that Congress said what it meant and meant what it said. Had Congress wished the Standards to act as a cap rather than an allowance, it knew what language to use."

In re Benedetti, 2007 WL 2083576 (Bankr. S.D.Fla. 2007)

UST moved to dismiss debtor's Chapter 7 case, as presumptively abusive under a properly performed "means test" calculation. Specifically, the UST objected to the "means test" calculation performed by debtor on the grounds that debtor had improperly deducted vehicle lease payments on motor vehicle that she intended to, and actually did, surrender. The court held that debtor who, on date bankruptcy petition was filed, was contractually obligated to make automobile lease payments to creditor asserting an interest in one of her two motor vehicles was entitled to deduct her obligations on this motor vehicle lease in performing "means test" calculation, even though she intended to surrender vehicle and would not actually be making these lease payments. "Using a

'snapshot' view of the Debtor's expenses on the date of filing makes sense in the context of a Chapter 7 case. The application of the provisions of sec. 707(b)(2) involves an evaluation of the Debtor's financial condition on the petition date such that a post-petition surrender of collateral is irrelevant and inconsequential. The means test is statutorily defined as a mechanism for determining whether a presumption of abuse arises in a Chapter 7 case, with reference to expenses 'as in effect on the date of the order for relief.' 11 U.S.C. § 707(b)(2)(A)(i) and (ii). The test has been described as a "snapshot" on the petition date rather than an evolving progress report on the Debtor's finances. *See In re Nockerts*, 357 B.R. 497 (Bankr. E.D.Wis. 2006)."

2. *In re Meza*, 2007 WL 1821416 (E.D. Calif. 2007)

UST moved to dismiss the case because the debtor's certificate of counseling was from an unapproved agency. The bankruptcy court found the debtor substantially complied with counseling requirements and denied the motion. (Debtor had been in a credit counseling plan with a debt consolidation service pre-petition.) UST appealed and the District Court affirmed.

3. *In re Jones*, 352 B.R. 813 (Bankr. S.D.Tex. 2006)

Debtors obtained credit counseling about 190 days before case was filed. UST moved to dismiss because counseling was not obtained within 180 days before petition. Court found that it had to dismiss case but stated, "if the US Trustee has any discretion (akin to "prosecutorial discretion" in other functions of the Justice Department), the Court would hope that the US Trustee would decline to prosecute a motion to dismiss under the circumstances presented in this case. A debtor who obtains credit counseling only 190 days prior to filing a bankruptcy petition and who delays filing a bankruptcy petition to try to implement the lessons learned in counseling certainly seems to meet the objective of the statute, if not the literal requirement. And unless the US Trustee has unlimited resources, it would seem that limited resources would be better put to other litigation."

4. *In re Romero*, 349 B.R. 616 (Bankr. N.D.Calif. 2006)

Debtors filed bankruptcy to stop a wage garnishment of their only income and asked for deferral of credit counseling due to exigent circumstances. They obtained counseling within time permitted by court. UST filed a motion to dismiss arguing the wage garnishment was not an exigent circumstance. The court denied the motion, stating: "In this case, Debtors faced imminent garnishment of their only income. The only way to stop the wage garnishment from taking effect was for Debtors to file bankruptcy by July 10. Debtors requested credit counseling from an approved agency on July 7, but were unable to obtain the requested services until seven days later. I determine that the looming wage garnishment constitutes exigent circumstances permitting a temporary waiver of the credit

counseling requirement."

5. *In re Bricksin*, 346 B.R. 497 (Bankr. N.D.Calif. 2006)

The debtors obtained counseling more than 180 days before the case was filed. The court denied the UST motion to dismiss, stating: "The Court finds that application of the statutory scheme to dismiss this case, as the Trustee urges, would produce a result at odds with Congressional intent. The intent behind these statutory amendments is to encourage debtors to seek alternatives to the bankruptcy process and to promote debtor awareness of the effects of a bankruptcy filing by requiring pre-petition credit counseling. Debtors had received extensive pre-petition credit counseling and then -- during the 180-day period prior to filing for bankruptcy -- were proceeding with their repayment plan, and making very substantial payments to creditors. While failing to comply with the law's technical letter, the Debtors were clearly in compliance with its spirit. The Court finds that the Debtors' need for a bankruptcy filing was not and could not have been obviated by additional credit counseling. Debtors were keenly aware of the implications of the bankruptcy filing. Indeed, CCCS had advised the Debtors that their only viable option was to file for bankruptcy. . . . Debtors have already paid for and completed two credit counseling sessions. It would be inequitable for this Court to hold that these Debtors' technical non-compliance with the law, despite their very best efforts, warrants dismissal of this case, which would require these Debtors to start all over, to pay another $ 299.00 filing fee, and potentially deprive them of the protection of the automatic stay."

6. *In re Koliba*, 338 B.R. 39 (Bankr. N.D.Ohio 2006)

Debtors and attorney failed to sign bankruptcy petition before it was filed electronically. UST moved to dismiss case. The court stated, "in this case, absolutely nothing has been put forth or even alleged which would tend to show that the Debtors are not honest, and thus not deserving of the protections of the Bankruptcy Code. On the other side of the coin, the UST did not offer any satisfactory explanation as to how an objective of bankruptcy law would be furthered by dismissal. For example, it did not allege that the dismissal of the Debtors' case would be in the best interest of the Debtors' estate or their creditors." The motion was denied.

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER

THIS CAUSE came before the Court for consideration of the Debtors' Motion for Reconsideration of Order. The Debtors are seeking reconsideration of the March 10, 2005 Order Sustaining Objections to Claimed Exemptions (C.P. 55). In addition to being untimely, the Motion for Reconsideration fails to sufficiently allege manifest error of law, misapprehension of fact, or fraud as required for rehearing pursuant to Federal Rule of Bankruptcy Procedure 9024. *See* F.R.Civ.P. 60(b) (made applicable by Fed.R.Bankr.P. 9024). Thus, there are insufficient grounds for rehearing or reconsideration. Accordingly, it is

ORDERED that the Debtors' Motion for Reconsideration of Order is **denied**.

In re Jean Raoul PETIT-LOUIS, Debtor.

No. 05-60335 BKC AJC.

United States Bankruptcy Court, S.D. Florida, Miami Division.

June 23, 2006.

Background: Prospective Chapter 7 debtor requested a waiver of prepetition credit counseling requirement. The Bankruptcy Court, A. Jay Cristol, Chief Judge Emeritus, 338 B.R. 132, granted debtor's request based on his limited English language skills and lack of Creole credit counselors, and United States Trustee (UST) moved for reconsideration.

Holdings: The Bankruptcy Court, Cristol, Chief Judge Emeritus, held that:

(1) UST's determination as to whether there were approved nonprofit budget and credit counseling agencies in district that were reasonably able to provide adequate counseling services, or whether there was lack of such agencies of kind sufficient to excuse debtor from having to obtain such counseling as prerequisite to bankruptcy relief, was subject to review by bankruptcy court; and

(2) debtor was entitled to waiver of credit counseling requirement imposed by Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), based on fact that, when petition was filed, there were no approved counseling agencies in district that offered credit counseling in Creole.

Motion denied.

1. Bankruptcy ⇐2164.1

Motion for rehearing is not opportunity to raise arguments which could have been made, but were not, at initial hearing.

2. Bankruptcy ⇐2222.1

United States Trustee's (UST's) determination as to whether there were approved nonprofit budget and credit counseling agencies in district that were reasonably able to provide adequate counseling services, or whether there was lack of such agencies of kind sufficient to excuse debtor from having to obtain such counseling as prerequisite to bankruptcy relief, was subject to review by bankruptcy court, which, if it decided that adequate counseling was lacking, had authority to waive counseling requirement. 11 U.S.C.A. § 109(h)(2).

3. Bankruptcy ⇐2222.1

Chapter 7 debtor's request for waiver of credit counseling requirement imposed by Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), based on fact that he was fluent only in Creole and lack of approved agencies in district that offered credit counseling in Creole, sufficiently placed United States Trustee (UST) on notice that debtor intended to challenge the UST's determination of adequacy of credit counseling in district. 11 U.S.C.A. § 109(h)(2).

4. Bankruptcy ⇐2222.1

If the United States Trustee (UST) fails to manage bankruptcy counseling system in non-discriminatory fashion, such as by failing to ensure that counseling services are available to non-English speaking debtors in district, bankruptcy court has authority, and indeed the responsibility, to allow debtors access to bankruptcy system by waiving requirement which, in practice, is inappropriately excluding them on basis of their lack of English language ability. 11 U.S.C.A. § 109(h)(2).

5. Bankruptcy ⇐2222.1

Mere fact that Chapter 7 debtor, a non-English-speaking individual who lacked funds to hire translator, might have asked friend or relative who spoke both English and his native Creole to accompany him to credit counseling agency did not excuse United States Trustee (UST), in determining adequacy of credit counseling services in district, of obligation to consider needs of non-English speaking residents in district; prospective debtor, in serious financial trouble and so destitute that he or she could not even afford to pay filing fee, would not be fairly treated by receiving gratuitous translation of unknown quality from friend or relative. 11 U.S.C.A. § 109(h)(2).

6. Bankruptcy ⇐2222.1

Chapter 7 debtor who was fluent only in Creole and lacked funds to hire translator was entitled to waiver of credit counseling requirement imposed by Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), based on fact that, when petition was filed, there were no approved counseling agencies in district that offered credit counseling in Creole. 11 U.S.C.A. § 109(h)(2).

Carolina A. Lombardi, Esq., Legal Services of Greater Miami, Inc., Miami, FL, John W. Kozyak, Esq., Lisa B. Keyfetz, Esq., Kozyak, Tropin & Throckmorton, P.A., Coral Gables, FL, Paul M. Uyehara, Esq., Community Legal Services, Inc., Philadelphia, PA, for Debtor.

Steven R. Turner, Esq., Assistant United States Trustee, Miami, FL, U.S. Trustee.

ORDER DENYING U.S. TRUSTEE'S MOTION FOR RECONSIDERATION OF ORDER GRANTING WAIVER OF CREDIT COUNSELING

A. JAY CRISTOL, Chief Judge.

This cause came before the Court for hearing on May 24, 2006 on the United States Trustee's Motion for Reconsideration of the Order granting a waiver of credit counseling required by 11 U.S.C. § 109(h)(1) for Mr. Petit-Louis. The Court granted the waiver because the approved credit counseling agencies in the Southern District of Florida were not reasonably able to provide adequate services to Mr. Petit-Louis, who only speaks and understands Creole.

The U.S. Trustee moved for reconsideration of the Court's waiver order on the

basis that the Court lacks authority to permanently waive credit counseling under 11 U.S.C. § 109(h)(3) and that Mr. Petit–Louis failed to comply with the requirements for obtaining a waiver under section 109(h)(3). Two days before rehearing, the U.S. Trustee supplemented its motion, and filed supporting affidavits, to argue for the first time that Mr. Petit–Louis was not entitled to a waiver of credit counseling because credit counseling was available in Creole in the district at the time Mr. Petit–Louis filed his bankruptcy petition. However, the U.S. Trustee did not bring any witnesses to the hearing for cross-examination.

Kozyak, Tropin & Throckmorton, PA and Legal Services of Greater Miami, Inc., on behalf of the Debtor, presented Carolina Lombardi, Esquire as a witness. The Court was uncertain about whether testimony was required to resolve this matter and allowed Attorney Lombardi to testify, subject to a later determination of whether or not testimony was required. As stated on the record, if testimony was required, then a further hearing would be held to allow the presentation of testimony by the U.S. Trustee. As the proceeding developed though, it became clear that testimony was not required, based upon the representations and admissions of both parties. The Court therefore did not consider the testimony of Attorney Lombardi and decided the matter on the pleadings, representations and admissions made in open Court at the hearing.

[1] Because a motion for rehearing is not an opportunity to raise arguments that could have been made, but were not, at the initial hearing, *see Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir.1990), the Court will reconsider the waiver order for the limited purpose of addressing whether the Court had authority to waive counseling based on the record as of January 31, 2006. The U.S. Trustee's motion to introduce the affidavits into evidence (made after the U.S. Trustee had rested), is denied and the affidavits will not be considered.

BACKGROUND

Jean Raoul Petit–Louis (the "Debtor") filed a voluntary chapter 7 petition on December 30, 2005 (the "Petition"). Mr. Petit–Louis is fluent in Creole, and has very limited English capability. He filed his petition and it was accepted *in forma pauperis* as provided by Bankruptcy Rule 1006(c).

At the hearing on January 31, 2006, Mr. Petit–Louis's counsel informed the Court that prior to filing the Petition, she contacted every approved counseling agency on the U.S. Trustee's approved list of agencies for the Southern District of Florida to determine whether the agency could provide credit counseling pursuant to section 109(h)(1) in Creole. In each instance, the agency representative who answered the phone stated that the agency could not provide credit counseling in Creole. It is not disputed that, at the time of the filing, the list maintained by the Office of the U.S. Trustee did not disclose the existence of any agency equipped to provide credit counseling in Creole.

Because he could not obtain the requisite pre-filing counseling in Creole, nor could he afford to hire an interpreter, Mr. Petit–Louis requested that the regional U.S. Trustee do any of the following: waive the credit counseling requirement; provide him with a Creole interpreter; or, decertify the approved counseling agencies for failure to provide Creole speaking counselors. By letter dated January 12, 2006, the U.S. Trustee declined to provide interpreter assistance, refused to waive the requirement and did not dispute the fact that no counseling was available in

Creole. A letter addressed to the U.S. Trustee requesting this relief was attached to Mr. Petit–Louis' petition, and, because the Debtor checked the box on Official Form 1 requesting a waiver for exigent circumstances, the letter was docketed as a "Certification of Exigent Circumstances".[1]

On January 31, 2006, the Court heard argument on the Debtor's request for waiver of section 109(h)(1)'s counseling requirement. The U.S. Trustee requested that the case be dismissed on account of Mr. Petit–Louis' failure to comply with section 109(h)(1). Following the hearing, the Court entered an order finding that there was no possibility that Mr. Petit–Louis could obtain counseling under the circumstances and that Mr. Petit–Louis was therefore entitled to a waiver of the counseling requirement because his inability to obtain counseling denied him access to the Bankruptcy Court. The Order is titled "Order on Debtor's Petition of Exigent Circumstances that Merits Waiver of Budget and Credit Counseling" and references section 109(h)(3).

At the time of the entry of the Order, the Court considered section 109(h)(3) as the appropriate section under which the Court had authority to grant a waiver to the Debtor. The Court does not recede from its earlier ruling; however, upon further reflection, the Court believes that it also has ample authority to waive the requirement of prepetition credit counseling for the Debtor under section 109(h)(2) of the Bankruptcy Code. Section 109(h)(2) provides the Court authority to grant the waiver premised upon the unavailability of counseling in Creole.

MEMORANDUM OPINION

[2] Under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), debtors are required to attend a credit counseling course from an agency approved by the Office of the U.S. Trustee prior to filing a petition. *See* 11 U.S.C. § 109(h)(1). However, pre-filing counseling is not required for:

> a debtor who resides in a district for which the United States trustee ... determines that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies by reason of the requirements of [section 109(h)(1)]. ...

Apparently there is no dispute that section 109(h)(2) provides the Office of the U.S. Trustee with the authority to waive the counseling requirement if the Office of the U.S. Trustee determines that adequate services are not available in a district. The U.S. Trustee's determination of adequacy under section 109(h)(2) is subject to review. *See In re Hubbard*, 333 B.R. 377, 385 (Bankr.S.D.Tex.2005) ("[o]f course, the United States trustee's determination [regarding adequacy] may be challenged."). Thus, the issue raised by the parties on reconsideration is whether the Bankruptcy Court had authority to waive Mr. Petit–Louis' section 109(h)(1) counseling requirement and whether Mr. Petit–Louis properly invoked the Court's jurisdiction to do so.

The U.S. Trustee contends that the Bankruptcy Court does not have jurisdiction to review the Office of the U.S. Trustee's adequacy determination. The U.S. Trustee asserts that Mr. Petit–Louis can only seek review pursuant to the Administrative Procedures Act (APA). The Court sees no merit in this argument, because

1. Official Form 1 only provides debtors with the option to request a waiver on account of "exigent circumstances" and not for lack of availability of adequate services.

even if the APA applies to the Debtor's waiver request, the Bankruptcy Court may review the U.S. Trustee's adequacy determination, as the APA specifically entitles an aggrieved party to judicial review of an agency's decision by "*any* applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction . . . in a court of competent jurisdiction" if no specific review proceeding is otherwise provided by statute. 5 U.S.C § 701, et seq. (emphasis added).

The parties did not brief or argue the applicability of the APA to this case and the Court does not make any determinations as to whether the U.S. Trustee's determination under 11 U.S.C. 109(h)(2) is within the scope of the APA. However, the Court notes that the U.S. Trustee's reliance on the APA only strengthens the Debtor's claim that he is entitled to judicial review because it supports the Debtor's contention that he must be afforded a forum within which to seek review of an arbitrary or capricious adequacy determination by the Office of the U.S. Trustee. Proceedings relating to a debtor's qualifications to be a debtor in the bankruptcy court—the type of proceeding at issue in this case—are clearly within the jurisdiction of the Bankruptcy Court. Therefore the Bankruptcy Court is the logical and proper forum for the Debtor's request of waiver of section 109(h)(1)'s counseling requirement on the basis that the counseling agencies approved by the Office of U.S. Trustee are not reasonably able to provide adequate services.

[3] Further, Mr. Petit–Louis' waiver request sufficiently placed the U.S. Trustee on notice that he intended to challenge the adequacy of counseling. The Debtor sent a letter to the U.S. Trustee and attached same to his petition, which explained the lack of availability of counseling in Creole. At the initial hearing on the Debtor's request for waiver, as was evident from the papers filed, the Debtor argued the lack of availability of counseling in Creole as the basis for asserting his right to waiver. While the Debtor arguably could have filed a motion requesting such waiver with his petition (rather than attaching a copy of the letter to the U.S. Trustee), the Court recognizes that this was a novel procedural issue for the Debtor (as well as for the Court and the U.S. Trustee). The U.S. Trustee was not prejudiced by the procedure invoked by the Debtor because the Debtor's letter provided sufficient notice, and the U.S. Trustee was given sufficient opportunity to respond.

[4] The Court acted within its discretion in determining that counseling services in the Southern District of Florida were inadequate for Mr. Petit–Louis and waiving the counseling requirement on this basis. At the January 31 hearing on the Debtor's request for waiver, the U.S. Trustee did not set forth any argument or proffer any evidence to demonstrate that it complied with its duties when the U.S. Trustee determined that adequate counseling in the Southern District of Florida was reasonably available. The U.S. Trustee could not and did not demonstrate that credit counseling was available to debtors such as Mr. Petit–Louis, who speak and understand only Creole, and cannot afford to hire an interpreter. Instead, the U.S. Trustee contended the Bankruptcy Code does not impose a responsibility on the Office of the U.S. Trustee to ensure that services are available to non-English speaking debtors. The U.S. Trustee's disregard for non-English speaking residents seeking counseling in the Southern District of Florida, a district which the U.S. Trustee admits "presents its own unique set of language issues", evidenced the fail-

ure of the Office of the U.S. Trustee to comply with its duties in determining whether counseling services are adequate in this district. If the U.S. Trustee fails to manage the bankruptcy counseling system in a non-discriminatory fashion, the Court has the authority and indeed the responsibility to allow a debtor access to the bankruptcy system by waiving a requirement which, in practice, is inappropriately excluding him on the basis of his lack of English language ability..

The Court acknowledges the U.S. Trustee's argument that the Office of the U.S. Trustee has made an effort to improve access to credit counseling to non-English speaking debtors since Mr. Petit-Louis filed his petition and commends the U.S. Trustee for this effort. The fact that the U.S. Trustee now argues that credit counseling is available in Creole and other languages and that the U.S. Trustee website is being updated almost daily defeats, rather than supports, the U.S. Trustee's initial argument that credit counseling in languages other than English is not required under 11 U.S.C. § 109(h)(2)(A), or under 11 U.S.C. § 111(d)(1)(c) which requires the U.S. Trustee to only approve credit counseling courses "if such course is effective."

[5] The Court also rejects the argument of the U.S. Trustee that the Debtor might have received the counseling in English, using a friend or relative who spoke Creole as an translator. Such a process in no way assures that the translation would be correct, accurate and effective; and in fact, the concept is frivolous. If such a procedure were appropriate and effective, then why are certified translators required in judicial proceedings? A prospective debtor, in serious financial trouble and so destitute that he or she cannot even afford to pay the filing fee, would not be fairly treated by receiving a gratuitous translation of unknown quality from a friend or relative.

One final word about 11 U.S.C. 109(h). The Court fully agrees with the basic concept adopted by Congress in regard to credit counseling. It is a good thing and should be required for and provided to every high school senior as a prerequisite to graduation. So timed, the counseling would be of immense value to millions and would no doubt have a positive effect in reducing the number of bankruptcy filings of certain types of cases. Unfortunately, the requirement for creditor counseling immediately prior to and as a prerequisite to filing bankruptcy is similar to locking the barn after the horse is gone. The present statutory requirement is the equivalent of requiring a person who has suffered a heart attack to listen to a lecture on exercise, diet and the evils of cholesterol before allowing such person to undergo open heart surgery.

[6] The relevant inquiry under section 109(h)(2) is what counseling was available to the Debtor before he filed. The fact that the U.S. Trustee has now discovered that counseling may have been available—information which the U.S. Trustee was not aware of at the initial hearing—bears no relevance to the Debtor's waiver request. The available counseling was inadequate for Mr. Petit-Louis at the time that he sought to file his petition, and he was entitled to a waiver of counseling pursuant to section 109(h)(2) on this basis.

Accordingly, it is

ORDERED AND ADJUDGED that the Trustee's Motion for Reconsideration is DENIED.

The Court further finds, however, that the Amended Chapter 11 Plan filed by Kathy Ridley satisfies the requirements for confirmation provided by § 1129, and that Ridley's Amended Chapter 11 Plan should be confirmed.

First, Ridley's Plan was proposed in good faith and not by any means forbidden by law, as required by § 1129(a)(3) of the Bankruptcy Code. Ridley's good faith is not affected by her failure to attach the commitment letter from First Federal Savings Bank to her original Disclosure Statement filed on October 1, 2004, or by her substitution of an alternative source of financing in her Amended Plan and Disclosure Statement.

Second, confirmation of Ridley's Plan is feasible, as required by § 1129(a)(11) of the Bankruptcy Code. Ridley has provided reasonable assurance that Fishbowl Marina, Inc. will be financially able to fund the purchase of the Debtor's property, and that the proceeds from the sale will be sufficient to satisfy the claims against the estate in full.

Ridley's Amended Chapter 11 Plan should be confirmed.

Accordingly:

IT IS ORDERED that:

1. The Amended Chapter 11 Plan of Reorganization filed by Kathy Ridley (Doc. 492) is confirmed.

2. Confirmation of the Second Amended Chapter 11 Plan of the Debtor (Doc. 194) is denied.

3. The Motion to Fix the Amount of All Claims and Administrative Expenses for Confirmation, filed by Kathy Ridley, is denied.

4. The Motion for Order Vacating Order Approving Disclosure Statement of Kathy Ridley, filed by the Debtor, Proud Mary Marina Corporation, is denied.

5. The Motion for Estimation of Application for Payment of Administrative Expense Claims of Kathy Ridley, filed by the Debtor, Proud Mary Marina Corporation, is granted as set forth in this Order.

In re Jean Raoul PETIT-LOUIS, Debtor.

No. 05-60335-BKC-AJC.

United States Bankruptcy Court,
S.D. Florida,
Miami Division.

March 1, 2006.

Background: Prospective Chapter 7 debtor requested a waiver of prepetition credit counseling requirement.

Holding: The Bankruptcy Court, A. Jay Cristol, Chief Judge Emeritus, held that prospective debtor who, while fluent in Creole, had only very limited English capability was entitled to waiver of credit counseling requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).

Requirement waived.

Bankruptcy ⇐2222.1

Prospective Chapter 7 debtor who, while fluent in Creole, had only very limited English capability was entitled to waiver of prepetition credit counseling requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), where there was no certified credit counseling agency that provided pre-bankruptcy counseling in Creole, and

where debtor could not afford to hire translator. 11 U.S.C.A. § 109(h)(3).

Carolina A. Lombardi, Esq., Legal Services of Greater Miami, Inc., Miami, FL, for Debtor.

ORDER ON DEBTOR'S PETITION OF EXIGENT CIRCUMSTANCES THAT MERITS WAIVER OF BUDGET AND CREDIT COUNSELING

A. JAY CRISTOL, Chief Judge.

This cause came to be heard at 10:00 a.m. on January 31, 2006, pursuant to this Court's notice of hearing on Debtor's Certification of Exigent Circumstances. Court Paper # 3 is Jean Raoul Petit-Louis' December 30, 2005 letter to Assistant United States Trustee M. Regina Thomas, in which Mr. Petit-Louis asked Ms. Thomas to waive the pre-bankruptcy budget and credit counseling since none of the approved counseling agencies had Creole speaking counselors. In the alternative Mr. Petit-Louis asked Ms. Thomas to provide a Creole translator, or decertify the approved counseling agencies for failure to provide Creole speaking counselors.

Jean Raoul Petit-Louis, a tenant in public housing owned by the Miami-Dade Housing Agency, filed Chapter 7 bankruptcy to discharge a debt of rent owed. He does not own any real property and does not have a car. Mr. Petit-Louis is fluent in Creole and has a very limited English capability. Upon application of the Debtor (CP # 6), and without objection by the United States Trustee, or any other party, the Court waived the Chapter 7 filing fee in this case.

The Assistant United States Trustee stated she has no authority to waive the pre-bankruptcy counseling requirement or decertify any counseling agencies approved for this district. The Assistant United States Trustee stated when an individual attempts to go through credit budget counseling, they are in contemplation of being a debtor, but they are not a debtor. The Assistant Trustee noted that even when debtors attend the meetings of creditors in this District, and they are at that time a debtor, they are still not provided with language interpreters. The Debtor must either have a family member or friend translate on their behalf, or pay for interpretive services.

The United State Trustee's position is that they do not have to provide language interpreters for individuals who may or may not be debtors, when, in fact, they are not required to provide interpretive services for debtors. The debtor is voluntarily affording himself of the bankruptcy process, and along with that comes rights and responsibilities, including insuring that he is eligible to be a debtor by obtaining pre-bankruptcy counseling. The Assistant United States Trustee stated that lack of English capability is not sufficient for a waiver, and was not intended by the statute, and that nowhere in the Code under the new Act is the United States Trustee Program obligated to ensure that the credit counseling agencies or the debtor educators provide services in multiple languages. Finally, the Assistant United States Trustee stated that Executive Order Number 13166 does not apply to credit counseling since it is not a federally funded program.

Debtor's counsel argued that the Executive Office for United States Trustees has a responsibility to administer the Bankruptcy Act to provide meaningful access to people of limited English proficiency, of which Mr. Petit-Louis is one. Counsel noted that the United States Trustee's office has already indicated a concern re-

garding meaningful access by persons of limited English proficiency by establishing a pilot project in this District in which DEBTORS are provided translators for creditor meetings.

Debtor's counsel notes that her firm provides a translator so she can provide services to her client, but that she should not have to provide those same services for him when he needs to access the court system. In addition, Debtor's counsel argues that it is inappropriate to argue that friends, family members and other social agencies can provide translation, since finances are a personal matter.

Under existing bankruptcy law, the Court does not provide interpreters for debtors or other parties. It is incumbent upon them to engage their own interpreter. However, there are some additional facets that need to be looked at in this case. This is not a case of an interpreter being needed during the bankruptcy proceedings, and if it were, what about a debtor who cannot pay the filing fee? Then, obviously, they could not pay for a certified interpreter AND CONGRESS HAS PROVIDED IN FORMA PAUPERIS FOR SUCH DEBTORS.

However, the new law requires credit counseling and places the obligation for providing the credit counseling in a meaningful way upon the Office of the United States Trustee, and as the Assistant United States Trustee has pointed out, there are ten approved credit counselors, but none of them offer Creole speaking counselors. Now, this is a matter that probably could go either way. You could take the position that since it is the custom of the Court in proceedings not to provide interpreters, that this policy will be carried over to the issue of credit counseling.

On the other hand, since the credit counseling is a new provision and it is provided for a particular purpose, the position could be taken that it should be strictly construed and that, if the credit counseling agency cannot provide the counseling in the debtor's language and the debtor cannot afford to hire a translator, there is no possibility the debtor can get the credit counseling. Therefore, this Court grants the waiver of the credit counseling requirement in this case because of the inability of any of the certified credit counseling agencies to provide pre-bankruptcy counseling in Creole.

Debtor's counsel also asked the Court to waive the financial management course requirement for the same reason, and the Court finds that this request is premature.

ORDERED and ADJUDGED that the pre-bankruptcy counseling requirement pursuant to 11 U.S.C. § 109(h)(3) is waived.

In re Daryl Evont ROSS, Debtor.

No. 05–86669–PWB.

United States Bankruptcy Court,
N.D. Georgia,
Atlanta Division.

Feb. 8, 2006.

Background: Chapter 13 case was filed by debtor who had not sought or obtained requisite credit counseling and budget briefing prepetition.

Holdings: The Bankruptcy Court, Paul W. Bonapfel, J., held that:

(1) petition served to commence case, despite debtor's ineligibility for bankruptcy relief; and

Westlaw.
--- B.R. ----
--- B.R. ----, 2007 WL 2298010 (Bkrtcy.S.D.Fla.), 20 Fla. L. Weekly Fed. B 515
(Cite as: --- B.R. ----)

In re **Morgan**
Bkrtcy.S.D.Fla.,2007.
Only the Westlaw citation is currently available.
United States Bankruptcy Court,S.D. Florida.
In re Joel V. **MORGAN**, Debtor.
No. 06-11263 BKC-AJC.

Aug. 8, 2007.

Background: Chapter 13 trustee objected to above-median-income debtor's proposed plan, as allegedly failing to satisfy "projected disposable income" test, at least when debtor properly performed "means test" calculation and did not attempt to take housing ownership expense deduction for residence that was free and clear of all liens and encumbrances.

Holding: The Bankruptcy Court, A. Jay Cristol, J., held that, under "means test," debtor was entitled to deduct standard housing expense for which he qualified based on size of his household and locality in which he lived, as being "applicable" housing expense to which he was entitled, notwithstanding that home in which debtor lived was free and clear of all liens and encumbrances, such that debtor had no "actual" ownership expense for housing.

Objection overruled in part.

[1] Statutes 361 ⇐188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
Starting point for court in interpreting statute is always its language.

[2] Bankruptcy 51 ⇐2021.1

51 Bankruptcy
51I In General
51I(B) Constitutional and Statutory Provisions
51k2021 Construction and Operation
51k2021.1 k. In General. Most Cited Cases
Plain meaning canon of statutory construction applies with equal force when court is asked to interpret the Bankruptcy Code.

[3] Bankruptcy 51 ⇐3705

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3705 k. Claims and Assets; Propriety and Feasibility in General. Most Cited Cases
Under "means test," as applied to determine "disposable income" of above-median-income Chapter 13 debtor, debtor was entitled to deduct standard housing expense for which he qualified based on size of his household and locality in which he lived, as being "applicable" housing expense to which he was entitled, notwithstanding that home in which debtor lived was free and clear of all liens and encumbrances, such that debtor had no "actual" ownership expense for housing; term "applicable," as used in bankruptcy statute that authorized debtor to deduct "applicable monthly expense amounts specified under the National and Local Standards," had to be contrasted with term "actual," as used later in same statute in allowing debtors to deduct only their actual "Other Necessary Expenses." 11 U.S.C.A. §§ 707(b)(2)(A)(ii)(I), 1325(b)(1)(B), (b)(3).

[4] Statutes 361 ⇐181(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(2) k. Effect and Consequences. Most Cited Cases

Statutes 361 ⇐188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
When statute's language is plain, sole function of court, at least where the disposition required by statutory text is not absurd, is to enforce statute according to its terms.

[5] Statutes 361 ⇐181(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(2) k. Effect and Consequences. Most Cited Cases
Interpreting statute according to its plain terms will be deemed to lead to "absurd" result, so as to permit court to depart from "plain meaning" canon of statutory construction, only if it is unthinkable, bizarre or demonstrably at odds with intentions of its drafters.

[6] Statutes 361 ⇐205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases
Statutory terms are not to be read in isolation, but while looking to provisions of statute as whole.

[7] Bankruptcy 51 ⇐3705

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3705 k. Claims and Assets; Propriety and Feasibility in General. Most Cited Cases
Under "means test" for determining reasonable, necessary expenses of above-median-income Chapter 13 debtor, for purpose of assessing whether plan proposed by debtor complies with "projected disposable income" requirement, bankruptcy court is to treat Local Standards promulgated by the Internal Revenue Service (IRS) as being in nature of fixed allowances, rather than of caps. 11 U.S.C.A. §§ 707(b)(2)(A)(ii)(I), 1325(b)(1)(B), (b)(3).

[8] Bankruptcy 51 ⇐2129

51 Bankruptcy
51II Courts; Proceedings in General
51II(A) In General
51k2127 Procedure
51k2129 k. Rules. Most Cited Cases
Bankruptcy Rules and the Official Forms are entitled to presumption of validity.

[9] Bankruptcy 51 ⇐3705

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3705 k. Claims and Assets; Propriety and Feasibility in General. Most Cited Cases
Goal of Congress in formulating "means test" as means of assessing an above-median-income debtor's reasonable, necessary expenses, for purpose of deciding whether plan proposed by debtor complies with "projected disposable income" requirement, was to remove or minimize judicial discretion, so as to allow for quick and formulaic analysis of debtor's disposable monthly income. 11 U.S.C.A. §§ 707(b)(2), 1325(b)(1)(B), (b)(3).

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Nancy N. Herkert, Miramar, FL, Trustee.
Office of the U.S. Trustee, Miami, FL, U.S. Trustee.

A. JAY **CRISTOL**, United States Bankruptcy Judge.
*1 THIS CAUSE came before the Court on January

30, 2007 upon the Trustee's Objection to Confirmation. The Trustee's objection to confirmation is based on three issues raised by the Debtor's Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income also known as Form B22C ("CMI Form"). This hearing focused on one issue, to wit, whether the Debtor could claim a deduction on his CMI Form, line 25B, for a mortgage/rent expense.

The following facts are undisputed. The Debtor resides in a single family home titled in the name of his grandmother. The Debtor claims an ownership interest in the home through inheritance. The property is free and clear of all liens and encumbrances. The Debtor does not pay a mortgage on the property nor does he pay any rental expenses. He does, however, pay the utilities on the property, as he resides on the premises, and he also pays the ad valorem taxes on the property.

The Debtor filed a voluntary Chapter 13 petition after the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCA"). The Debtor filed a CMI Form as required by BAPCA. The Debtor's CMI Form reflects that the Debtor is over the Florida median income, requiring him to determine his disposable income pursuant to pursuant to 11 U.S.C. § 1325(b)(3). The Debtor therefore entered on the form the deductions allowed under 11 U.S.C. § 707(b)(2), as provided by 11 U.S.C. § 1325(b)(3). Among others, he claimed a deduction of $911.00 for mortgage/rent expense using the Internal Revenue Service's Local Standards for a one-member household in Miami-Dade County, Florida. It is this line item to which the Trustee has objected, arguing that the housing expense deduction under the IRS' Local Standards could only be claimed by a debtor who actually pays that expense.

[1][2] The Trustee argues that the Debtor cannot include an expense on the CMI Form which he does not actually have. The Debtor argues that, notwithstanding a debtor's actual situation, a debtor is permitted to claim the amount set forth in the IRS' Local Standards as Congress wished to create a uniform and fair test to determine a debtor's ability to pay. Both parties agree that the Court must look to the plain meaning of the statutory language of BAPCA for its ruling. "The starting point for our interpretation of a statute is always its language. The plain meaning canon of statutory construction applies with equal force when interpreting the Bankruptcy Code."*In re Yates Development,* 256 F.3d 1285, 1288 (11th Cir.2001). However, the parties disagree on the interpretation of the plain language of the statute.

Because a Chapter 13 plan is funded by disposable income, a determination of the available amount of disposable income is significant. Disposable income is addressed in 11 U.S.C. § 1325. Section 1325(b)(2) defines disposable income as the debtor's income "less amounts reasonable and necessary to be expended for the maintenance or support of the debtor or a dependant of the debtor".Section 1325(b)(3) states that "[a]mounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)" if the debtor's income is over the state's median income.

***2** The Debtor's CMI Form demonstrates that the Debtor's income is above the state median. Therefore, the Court must look to 11 U.S.C. § 707(b)(2) to determine the Debtor's disposable monthly income. Section 707(b)(2)(A)(ii)(I) states:
The debtor's monthly expenses *shall be* the debtor's *applicable monthly expense amounts specified* under the National Standards and Local Standards, and the debtor's *actual monthly expenses* for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides....

11 U.S.C. § 707(b)(2)(A)(ii)(I) (emphasis added).

[3] The determination of whether the Debtor is allowed a deduction for a mortgage/rental expense, when he does not actually pay one, depends upon

the meaning of the phrase "*applicable* monthly expense amounts specified under the National Standards and Local Standards," as expressed in 11 U.S.C. § 707(b)(2)(A)(ii)(I). The Debtor argues that the term "applicable" simply means that the Local Standard to be applied shall depend on the size of the Debtor's household, as well as the state wherein the Debtor resides. The Trustee counters that the term "applicable", a s it relates to the monthly expenses, means that the Local Standard shall be applied only when such a payment is being made. Put another way, the Trustee argues that "applicable monthly expenses" means the same thing as "actual monthly expenses".

Upon review of the case law and the language of the applicable statutes and guidelines, the Court is persuaded that the plain meaning of the phrase "applicable monthly expenses" found in section 707(b)(2)(A)(ii)(I) of the Bankruptcy Code entitles the Debtor to deduct from current monthly income the Local Standard allowance for housing/rental expense, without regard to whether the Debtor actually pays a housing/rental expense. *See* Wedoff, *Means Testing in the New § 707(b),* 79 Am. Bankr.L.J. 231.

A. *The National and Local Standards*

The National and Local Standards to which 11 U.S.C. § 707(b)(2)(A)(ii)(I) refers are the Collection Financial Standards used by the Internal Revenue Service ("IRS") to determine a taxpayer's ability to pay a delinquent tax liability. The National Standards set amounts for five expenses: (1) food, (2) housekeeping supplies, (3) apparel and services, (4) personal care products and services, and (5) miscellaneous. The National Standards are based on the taxpayer's gross income and family size.

The Local Standards set separate amounts for (1) housing and utilities, and (2) transportation. The housing component is further divided into two categories: (a) rent/mortgage expenses; and (b) housing and utility expenses. The Local Standards housing deductions are based on the taxpayer's family size and location.

Under the Financial Analysis Handbook in the Internal Revenue Manual ("IRM"), the taxpayer is allowed the full amount of the *National* Standards deductions for tax purposes, regardless of his actual expenses. IRM at 5.15.1.8 ¶ 2. Thus, "even hypothetical taxpayers living in a Garden of Eden, with cost-free satisfaction of all their basic needs, would still be allowed a deduction ... set out in the National Standards."*In re Fowler,* 349 B.R. 414, 417 (Bankr.D.Del.2006) (citing Wedoff, *Means Testing in the New § 707(b),* 79 Am. Bankr.L.J. at 254). On the other hand, when applying the Local Standards for tax purposes, "[t]he taxpayer is allowed the local standard or the amount actually paid, *whichever is less.*" IRM at 5.15.1.7 ¶ 4 (emphasis added).

B. *Plain language of 11 U.S.C. § 707(b)(2)(A)(ii)(I)*

*3 [4][5] The starting point for the court's inquiry is the statutory language of 11 U.S.C. § 707(b)(2)(A)(ii)(I) itself. *Lamie v. U.S. Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004); *Toibb v. Radloff,* 501 U.S. 157, 160, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991); *U.S. v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241-42, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989); *U.S. v. Steele,* 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("In construing a statute we must begin, and often should end as well, with the language of the statute itself."). It has been well established that "when the statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms."*Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (internal quotations omitted). A result will only be deemed absurd if it is unthinkable, bizarre or demonstrably at odds with the intentions of its drafters. *See In re Spradlin,* 231 B.R. 254, 260 (Bankr.E.D.Mich.1999) (citing *Public Citizen v. Dept. of Justice,* 491 U.S. 440, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989)).

[6] However, as often happens with statutory language, the "plain" meaning of a statute can have different and competing interpretations. *See In re Benedetti,* 2 007 WL 2083576 (Bankr.S.D.Fla. July 13, 2007). Statutory terms, though, are not to be read in isolation; they are to be read while looking to the provisions as a whole. *In re Welzel,* 275 F.3d 1308, 1317 (11th Cir.2001).

The Debtor argues that the plain language of section 707(b)(2)(A)(ii)(I) permits the Debtor to take the Local Standards mortgage/rent deduction of $911.00 per month. The Trustee however, contends that because the Debtor has no actual monthly mortgage or rental expense, the Debtor is not entitled to take the Local Standards deduction. Ultimately, the determination of whether the deduction is allowed depends upon the meaning of the phrase "*applicable* monthly expense amounts specified under the National Standards and Local Standards," as expressed in 11 U.S.C. § 707(b)(2)(A)(ii)(I).

C. *Case law interpreting the "plain" meaning of 11 U.S.C. § 707(b)(2)(A)(ii)(I)*

While only a few courts have addressed the Local Standards deduction with regard to housing, bankruptcy courts across the country have faced this issue with regard to the transportation deduction under the Local Standards. Generally, courts are split on the reading of the term "applicable monthly expenses." On one side are the courts which deny the use of the ownership allowance where the debtor owns a vehicle free and clear of liens. *E.g. In re Slusher,* 359 B.R. 290, 2007 WL 118009, at * 14 (Bankr.D.Nev. Jan.17, 2007); *In re Devilliers,* No. 06-10415, 2007 WL 92504, at *14 (Bankr.E.D.La.Jan.9, 2007); *In re Harris,* 353 B.R. 304, 309-10 (Bankr.E.D.Okla.2006); *In re Oliver,* 350 B.R. 294, 301 (Bankr.W.D.Tex.2006); *In re Carlin,* 348 B.R. 795, 797 (Bankr.D.Or.2006); *In re Wiggs,* 2006 WL 2246432, at *3 (Bankr.N.D.Ill.Aug.4, 2006); *In re Lara,* 347 B.R. 198, 201 (Bankr.N.D.Tex.2006); *In re Barraza,* 346 B.R. 724, 727-29 (Bankr.N.D.Tex.2006); *In re McGuire,* 342 B.R. 608, 613 (Bankr.W.D.Mo.2006); *In re Hardacre,* 338 B.R. 718, 728 (Bankr.N.D.Tex.2006).

*4 On the other side are the courts which permit a debtor who owns a vehicle free of liens to take the ownership allowance. *E.g., In re Fowler,* 349 B.R. 414, 417 (Bankr.D.Del.2006); *In re Hartwick,* 352 B.R. 867, 868-69 (Bankr.D.Minn.2006); *In re Demonica,* 345 B.R. 895, 905 (Bankr.N.D.Ill.2006); *In re Grunert,* 353 B.R. 591, 594 (Bankr.E.D.Wis.2006); *In re Sorrell,* 359 B.R. 167, 2007 WL 211276, at * 17 (Bankr.S.D. Ohio Jan 26, 2007); *In re Zak,* 361 B.R. 481, 2007 WL 143065 at *7 (Bankr.M.D.Ohio Jan. 12, 2007); *In re Crews,* No. 06-10422C-13G, 2006 WL 3782865, at *1 (Bankr.M.D.N.C. Dec. 22.2006); *In re Wilson,* 356 B.R. 114, 119 (Bankr.D.Del.2006); *In re Ha ley,* 3 54 B.R. 340, 344 (Bankr.D.N.H.2006); *In re Prince,* No. 06-10328C-7G, 2006 WL 3501281, at *4 (Bankr.M.D.N.C. Nov.30, 2006).

1. Unavailability of Local Standards

The cases supporting the Trustee's position have interpreted the plain language of the statute as prohibiting the use of the ownership allowance where the debtor owns a vehicle free of liens. In *Wiggs,* the court determined that "the language of the statute is clear and unambiguous."2006 WL 2246432 at *2. It found that "the term 'applicable' modifies the amounts specified to limit the expenses to only those that apply."*Id.* The court stated that interpreting the statute as allowing every debtor to claim the full ownership amount would make the term "applicable" "superfluous." *Id.* Accordingly, the court held that the debtor was not allowed to take the ownership allowance when the debtor did not have a vehicle payment. *Id.* at 3.

Other courts which have not allowed deductions under the Local Standards have relied upon the IRS publications for guidance in determining when and how to apply the Local Standards deduction. For example, in *Hardacre,* 338 B.R. at 728, the court denied confirmation of the debtors plan, relying *only* on the IRS' application of the Standards. *Id.* The court explained that "[t]he Collection Financial

Standards prohibit the deduction claimed by the debtor" and, therefore, they do not permit a debtor to claim an ownership deduction for a vehicle owned free and clear by the debtor. *Id.* In *McGuire,* the court explained that *"[a]ccording to IRS publications* regarding the application of its standards ... the ownership expense only applies to debtors who actually are obligated to pay a monthly loan or lease."342 B.R. at 612. The court noted that because the IRS guidelines mandate that a taxpayer cannot claim an IRS ownership expense for a vehicle they own free and clear, the same was true for debtors in bankruptcy. *Id.* at 613.According to the *McGuire* court, this was the proper reading of section 707(b)(2)(A)(ii)(I) because, "if a debtor does not own or lease a vehicle, the ownership expense is not "applicable" to that debtor ... [an interpretation that] conforms with the IRS's application of the Standards."*Id.*

2. Local Standards Available as Fixed Allowances

***5** The interpretation by courts which hold "applicable" to mean "actual" has been criticized on two grounds. First, these decisions look for guidance in the IRS manuals, which manuals state that the expenses in question cannot be claimed if a *taxpayer* has not incurred them. However, section 707(b)(2)(A)(ii)(I)"nowhere incorporates wholesale all IRS criteria for tax collection matters."*In re Farrar-Johnson,* 353 B.R. 224, 231 (Bankr.N.D.Ill.2006). Indeed, "the statute is what matters (and if necessary the legislative history), not internal IRS manuals."*Id. See, e.g ., Fowler,* 349 B.R. at 420 (refusing to follow *Hardacre* line of cases as they "*relied on the IRM, not the Bankruptcy Code,* to conclude that the deduction is allowable only for cars that are subject to a lease or purchase obligation") (emphasis added); *In re Barrett,* 2007 WL 2021998 at *2 (Bankr.S.D.Ill. July 10, 2007) ("there is no authority in the Bankruptcy Code for using the Internal Revenue Manual when interpreting § 707(b)(2)(A)(ii)(I)); *In re Swan,* 368 B.R. 12, 2007 WL 1146485 at *6 (Bankr.N.D.Cal. Apr.18, 2007) ("[n]one of the courts using the IRS publications in reaching their decisions cited any specific authority for doing so, but simply found it 'instructive' to do so"); *Haley,* 354 B.R. at 344 (the IRS and the Bankruptcy Code use the ownership expense for different purposes); *Hartwick,* 352 B.R. at 870 (IRS directive has no application to determining the debtor's applicable expense amounts as part of the means test because IRS' use of the Local Standards is the opposite of that mandated by BAPCPA, that is the applicable IRS allowed amount is either the Standard amount or actual amount, whichever is lower).

A second criticism of the cases disallowing the deduction for debtors owning their vehicles free and clear is that some of the decisions define the word "applicable" in section 707(b)(2)(A)(ii)(I) to mean "actual." *See Wiggs,* 2006 WL 2246432, at *2;*McGuire,* 342 B.R. at 613. In doing so, however, they fail to reconcile or explain the presence of the word "actual" later in the same sentence. In contrast, the courts allowing the deduction point out that the use of "actual" with respect to Other Necessary Expenses and "applicable" with respect to the National and Local Standards must mean that Congress intended two different applications. *See Fowler,* 349 B.R. at 418 (citing *Duncan v. Walker,* 533 U.S. 167, 173, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion")); *Grunert,* 353 B.R. at 594 (Congress drew distinction in the statute between "applicable" expenses on the one hand and "actual" expenses on the other-expenses under the Local Standards need only be those "applicable" to the debtor, based upon where he lives and how large his household is; it makes no difference whether he "actually" has them); *Demonica,* 345 B.R. at 902 ("to give effect to every word in [section 707(b)(2)(A)(ii)(I)], the term 'actual monthly expenses' cannot be interpreted to mean the same as 'applicable monthly expenses' "); *In re Donald,* 343 B.R. 524, 537 (Bankr.E.D.N.C.2006) ("use of a particular phrase in one statute but not in another 'merely highlights the fact that Congress knew how to

include such a limitation when it wanted to' ").

*6 This Court believes the criticism is warranted and finds that section 707(b)(2)(A)(ii)(I) deems a debtor's expenses to be the "amounts specified" in the Local Standards. Because 11 U.S.C. § 707(b)(2)(A)(ii)(I) provides that the debtor's allowed expenses "shall be" the "amounts specified" under the Local Standards-and because the statute makes no provision for reducing the specified amounts to the debtor's actual expenses-a plain reading of the statute would allow a deduction of the amounts listed in the Local Standards even where the debtor's actual expenses are less. Wedoff, *Means Testing in the New 707(b),* 79 Am. Bankr.L.J. 231, 257-58 (2005).*See also 6 Collier on Bankruptcy* ¶ 707.05(2)(c)(i) (A. Resnick and H. Sommer, eds., 15th ed. Rev.2005) ("The better view is that, because the language refers to deducting the 'amount specified' in the standards, and not actual expenses, the ownership allowance specified in the standards is the minimum amount to be deducted.").

Although only a few courts have addressed the housing expense deduction directly, this Court believes the better reasoned cases are those which permit the deduction as a fixed allowance. In *Farrar-Johnson,* 353 B.R. at 224, the debtors lived in army housing and reported no mortgage or rent payments. However, on their CMI Form, the debtor claimed the Local Standards mortgage/rent deduction. The *Farrar-Johnson* court explained that "[r]ead in isolation, 'applicable' is ambiguous, meaning simply: 'That can be applied; appropriate.' *Id.,* (citing American Heritage Dictionary 89 (3rd ed.1996)). The court then explained that an expense could be "appropriate" for a debtor to claim because he actually incurs that expense, or, conversely, because he lives in a certain state and county and has a household of a certain size.

The court noted that 11 U.S.C. § 707(b)(2)(A)(ii)(I) defines monthly expenses not only as a debtor's "*applicable* monthly expense amounts" under the National and Local Standards but also as the debtor's "*actual* monthly expenses" for the categories the IRS specifies as "Other Necessary Expenses." 11 U.S.C. § 707(b)(2)(A)(ii)(I) (emphasis added). The *Farrar-Johnson* court found that by using two different terms within the very same sentence, Congress drew a distinction in the statute between "applicable" expenses on the one hand and "actual" expenses on the other. *Farrar-Johnson,* 353 B.R. at 230. "Other Necessary Expenses" must be the debtor's "actual" expenses, while expenses under the Local Standards need only be those "applicable" to the debtor because of where he lives and how large his household is. *Id.*The *Farrar-Johnson* court held it makes no difference whether the debtor actually has the expenses listed in the Local Standards for them to be "applicable".*Id.* at 231.This Court agrees.

In *In re Naslund,* the court also addressed the housing expense deduction under the Local Standards. 359 B.R. 781 (Bankr.D.Mont.2006). In *Naslund,* the debtor's actual monthly rent payment was $545 but the debtor claimed a deduction of $722 on Form B22C, the appropriate IRS Housing and Utility Local Standard. 359 B.R. at 791. The court agreed with the debtor that actual monthly expenses are *only* considered for the categories specified as Other Necessary Expenses, and explained that "the term "applicable" in section 707(b)(2)(A)(ii) clearly references the National and Local Standards that apply to a particular debtor as determined by the debtor's family size and place of residence. *Id* . at 791-92.*See also, Swan,* 368 B.R. 12, 2007 WL 1146485 at *8 (following the *Farrar-Johnson* and *Naslund* courts, the court held that debtor could claim full amount under Local Standards even though actual rent was lower); *In re Barrett,* 2007 WL 2021998 at *2 (Bankr.S.D.Ill. July 10, 2007) (same).*Contra In re Rezentes,* 368 B.R. 55, 2007 WL 988055 at *6 (Bankr.D.Haw. Apr. 2, 2007) (following *Hardacre,* the court held that "for purposes of calculating projected disposable income, debtors may deduct the local standard housing expense or their actual housing expense, whichever is less").

*7 The Court is persuaded by the reasoning in *Farrar-Johnson* and *Naslund* and finds the term

"applicable", as used in the statute, does not mean "actual" with respect to monthly expenses.

D. *Legislative history of § 707(b)(2)(A)(ii)(I)*

[7] This Court agrees with those courts which have cited BAPCPA's legislative history as supporting the use of Local Standards as a fixed allowance rather than a cap. If Congress had intended to adopt wholesale the language and intent of the IRS publications, it could have done so explicitly. Congress did not. The fact that Congress chose to use the term applicable instead of actual is proof that Congress chose a fixed and rigid standard instead of one that reflects the debtor's actual position. *See Fowler,* 349 B.R. at 418;*Grunert,* 353 B.R. at 594;*Demonica,* 345 B.R. at 902;*Prince,* 2006 WL 3501281, at *2.

The *Fowler* court noted that in a prior version of BAPCPA that was not passed, Congress defined "projected monthly net income" to require the following calculation of expenses: (A) the expense allowances under the applicable National Standards, Local Standards, and Other Necessary Expenses allowance ... as determined under the Internal Revenue Service financial analysis for expenses in effect as of the date of the order for relief. 349 B.R. at 419 (quoting H.R. 3150, 105th Congress (1998)). However, the language referring to the IRS financial analysis was changed to the current language of section 707(b)(2)(A)(ii)(I), which simply provides that the debtor can take the "applicable monthly expense amounts specified under the National and Local Standards."*Id.* The court concluded that this change from the prior version requiring the use of the IRS financial analysis to the current version "evidences Congress' intent that the Courts not be bound by the financial analysis contained in the IRM and lends credence to the Court's conclusions that it should look only to the amounts set forth in the Local Standards."*Id.*

The *Farrar-Johnson* court also noted that the legislative history of 11 U.S.C. § 707(b)(2)(A)(ii)(I) evidences a desire to make the means test rigid, inflexible, and not reflective of the debtors actual circumstances. 353 B.R. at 231. In fact, the court explained, "eliminating flexibility was the point: the obligations of chapter 13 debtors would be subject to 'clear, defined standards,' no longer left 'to the whim of a judicial proceeding.' " *Id. See also, Hartwick,* 352 B.R. at 870 (explaining that "a major objective of the legislation was to remove judicial discretion from the process" and that the means test therefore "presents a backward looking litmus test performed using mathematical computations of arbitrary numbers, often having little to do with a particular debtor's actual circumstances and ability to pay a portion of debt")

[8] The Debtor's position is further supported by the Official Forms. The forms mandate use of the IRS figures as straight allowances, not as caps on actual expenses, for all IRS categories except Other Necessary Expenses. The Rules Committee noted that "[e]ach of the amounts specified by the IRS in the Local Standards are treated by the IRS as a cap on actual expenses, but because § 707(b)(2)(A)(ii)(I) provides for deduction in the amounts specified under the Local Standards, the forms treat these amounts as allowed deductions."*See* Advisory Committee Notes on Forms, *http:// www.uscourts.gov/rules/BK Forms 06 Official/Form 22A-C_CN_Cum_1006.pdf.*The Official Forms, like the Interim Bankruptcy Rules, were promulgated by the Rules Committee and approved by the Judicial Conference of the United States. Both the Rules and the Official Forms share the presumption of validity. *See, e.g.*,FRBP 1001; *In re Dominguez,* 51 F.3d 1502 (9th Cir.1995) (Bankruptcy Rules presumptively valid); *In re Cluff,* 313 B.R. 323, 335 n. 37 (Bankr.D.Utah 2004) (Official Forms, which are created for the same reasons as the Bankruptcy Rules, should be awarded the same deference and weight).

***8** The Court believes it significant that, in structuring the means test, Congress established a formula for computing a debtor's monthly income which can establish a substantial fictitious monthly income for a debtor who has lost a job and has no monthly income whatsoever. Surely, the intent to create a fiction relating to income that creates an

extremely adverse circumstance for a debtor suggests that application of a fictitious standard that creates a beneficial circumstance for a debtor was likewise intended.

E. *Policy Considerations*

If the Court were to accept the Trustee's position and cap Debtor's housing deduction on the CMI Form at his actual expense, it would have the effect of locking Debtor into that expense for the duration of the Chapter 13 Plan. Such a result would be unfair to the Debtor because it is possible that the Debtor's housing expense will not remain at the current level throughout the Plan term. As one court noted "[c]ircumstances inevitably change. Rents generally go up. People move."*Swan,* 368 B.R. 12, 2007 WL 1146485 at *7. Requiring Debtor to modify his Plan if he moves or if he incurs a rent increase after he moves is inconsistent with BAPCPA, and is terribly inefficient. The standardized deduction provided in the language of BAPCPA is far more efficient.

Additionally, acceptance of the Trustee's position would create an incentive for debtors to relocate to enable them to spend the full amount of the allowable housing deduction on their housing expense. If presented with the choice of living in a house or apartment that costs $900 (the rough amount allowed under the Local Standards), or one that costs nothing but requires being tethered to a plan that makes no allowance for a possible relocation, a debtor might likely choose the former. For the courts to promote such a choice would be irresponsible. *See Swan,* 368 B.R. 12, 2007 WL 1146485 at *7 (not giving debtor full amount of housing allowance, as a matter of course, will encourage debtors to move in order to spend full amount).

In light of the well reasoned analysis of the case law set forth herein, the Court is persuaded the Debtor is allowed a deduction for the mortgage/ rental expense. The plain meaning of the statute and its use of the term "applicable" instead of "actual" evidences Congress' intent to set the Local Standards as a fixed allowance rather than a cap. The Court must assume that Congress said what it meant and meant what it said. Had Congress wished the Standards to act as a cap rather than an allowance, it knew what language to use.

Although the Court finds that the plain language of the statute is clear, even if it was ambiguous, the result would not change. Where a statute is ambiguous, a court may look to the legislative history for guidance to determine Congress' intent. In contrast to the IRM, Congress included no reference in the final BAPCPA language to the use of the Local Standards as a cap, signifying that it did not intend the Local Standards to be applied as such.

*9 [9] Finally, use of the Standards as a fixed allowance recognizes BAPCPA's goal of removing or minimizing judicial discretion when applying the means test, allowing for a quick and formulaic analysis of the Debtor's disposable monthly income. It also allows the most efficient formula because it looks to the future and allows the debtor to have access to funds should their circumstances change through an increase in rent or relocation to a new residence. Were the Debtor only allowed the lesser of his actual expenses or the Standards amount, he would incur substantial expense with even the slightest of altered circumstances and expenses.

Treating the Local Standards deduction as a fixed allowance rather than a cap on actual expenses is supported by the plain meaning of the statute, the legislative history, and carefully reasoned case law. This Court therefore respectfully disagrees with the line of cases that has determined that debtors must have a housing payment to claim the Local Standards deduction. Thus, for the foregoing reasons, it is

ORDERED AND ADJUDGED that the Trustee's Objection to Confirmation of the Debtor's Chapter 13 plan is OVERRULED in part, and the Debtor is allowed the Local Standards deduction for a mortgage/rental expense, notwithstanding the fact he pays no mortgage payment or rental obligation.

The Trustee's objection is reset for further hearing on ***August 28, 2007 at 1:30*** PM in Courtroom 1410, 51 SW First Ave., Miami, FL to consider the remaining objections to confirmation.

Bkrtcy.S.D.Fla.,2007.
In re Morgan
--- B.R. ----, 2007 WL 2298010 (Bkrtcy.S.D.Fla.), 20 Fla. L. Weekly Fed. B 515

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--- B.R. ----
--- B.R. ----, 2007 WL 2083576 (Bkrtcy.S.D.Fla.), 20 Fla. L. Weekly Fed. B 484
(Cite as: --- B.R. ----)

C
In re **Benedetti**
Bkrtcy.S.D.Fla.,2007.

United States Bankruptcy Court, S.D. Florida,
Miami Division.
In re Stacey **BENEDETTI**, Debtor.
No. 06-13003-BKC-AJC.

July 13, 2007.

Background: United States Trustee (UST) moved to dismiss debtor's Chapter 7 case, as presumptively abuse under a properly performed "means test" calculation. Specifically, the UST objected to "means test" calculation performed by debtor, on ground that debtor had improperly deducted vehicle lease payments on motor vehicle that she intended to, and actually did, surrender.

Holding: The Bankruptcy Court, A. Jay Cristol, J., held that debtor who, on date bankruptcy petition was filed, was contractually obligated to make automobile lease payments to creditor asserting an interest in one of her two motor vehicles was entitled to deduct her obligations on this motor vehicle lease in performing "means test" calculation, even though she intended to surrender vehicle and would not actually be making these lease payments.

Motion denied in part.

[1] Statutes 361 ⇐188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 ⇐189

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k189 k. Literal and Grammatical Interpretation. Most Cited Cases
Plain meaning of legislation should be conclusive, except in those rare cases in which literal application of statute will produce a result demonstrably at odds with intentions of its drafters.

[2] Statutes 361 ⇐206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
In determining statute's plain meaning, court is to give effect to every clause and word of statute.

[3] Statutes 361 ⇐184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases

Statutes 361 ⇐205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases
Statutory construction is holistic endeavor, and in interpreting one part of statute, court must not be guided by single sentence or member of sentence, but look to provisions of the whole law, and to its object and policy.

[4] Bankruptcy 51 ⇐2264(1)

51 Bankruptcy
51III The Case
51III(C) Voluntary Cases
51k2259 Dismissal
51k2264 Proceedings; Motion or Sua Sponte Action
51k2264(1) k. In General. Most Cited Cases

Chapter 7 debtor who, on date bankruptcy petition was filed, was contractually obligated to make automobile lease payments to creditor asserting an interest in one of her two motor vehicles was entitled to deduct her obligations on this motor vehicle lease, in performing "means test" calculation to determine whether her Chapter 7 case was presumptively subject to being dismissed as abuse of provisions of that chapter, though debtor intended to surrender vehicle and did in fact surrender it shortly after petition was filed; neither debtor's intent to surrender vehicle nor the postpetition act of surrender affected fact that, when petition was filed, her obligations on motor vehicle lease were part of "all amounts scheduled as contractually due to secured creditors," such as debtor was entitled to deduct under the plain meaning of language employed by Congress in formulating "means test." 11 U.S.C.A. § 707(b)(2)(A)(iii).

[5] Bankruptcy 51 ⇐2264(1)

51 Bankruptcy
51III The Case
51III(C) Voluntary Cases
51k2259 Dismissal
51k2264 Proceedings; Motion or Sua Sponte Action
51k2264(1) k. In General. Most Cited Cases

"Means test," as applied in Chapter 7 cases to determine which cases are presumptively subject to being dismissed as abuse of provisions of that chapter, presents backward-looking litmus test that is performed using mathematical computation of arbitrary numbers, often having little to do with particular debtor's actual circumstances and ability to pay portion of his or her debt, and is meant to remove judicial discretion from process. 11 U.S.C.A. § 707(b)(2).

[6] Bankruptcy 51 ⇐2264(1)

51 Bankruptcy
51III The Case
51III(C) Voluntary Cases
51k2259 Dismissal
51k2264 Proceedings; Motion or Sua Sponte Action
51k2264(1) k. In General. Most Cited Cases

"Means test," as applied in Chapter 7 cases to determine which cases are presumptively subject to being dismissed as abuse of provisions of that chapter, seeks to measure debtor's need for Chapter 7 relief at time of filing, without regard to future events. 11 U.S.C.A. § 707(b)(2).

Timothy S. Kingcade, Esq., Miami, FL, for Debtor.

A. JAY **CRISTOL**, Bankruptcy Judge.

*1 THIS MATTER came before the Court for hearing upon the United States Trustee's ("UST") Motion to Dismiss Chapter 7 Case Pursuant to 11 U.S.C. § 707(b) ("Motion to Dismiss") (DE # 22). In the Motion to Dismiss, the UST argues that: (1) Debtor should not be allowed to deduct payments on secured property that she intends to surrender; and (2) without those deductions, the presumption of abuse arises. The Court heard arguments from counsel, and directed the parties to submit post-hearing memoranda on the issue of whether Debtor may include in her means test calculation installment payments on a vehicle surrendered after the filing of her bankruptcy case. Upon consideration of the foregoing, and in light of the record before it, the Court concludes that the deduction of payments on collateral [which is intended to be surrendered after the filing of the petition] is allowed.

The Court has jurisdiction of this matter under 28 U.S.C. § 1334(a) & (b), 28 U.S.C. § 157(a) & (b), and 28 U.S.C. § 151. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) & (B). The UST

files the Motion to Dismiss pursuant to 11 U.S.C. § 707(b)(2).

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L.No. 109-8, 119 Stat. 37 ("BAPCPA") became effective on October 17, 2005. One goal of BAPCPA was to prevent debtors from receiving a discharge under chapter 7 when they had disposable income that could be used to repay their creditors. *See In re Hardacre,* 338 B.R. 718, 725 (Bankr.N.D.Tex.2006) quoting 151 Cong. Rec. S2459, 2469-70 (March 10, 2005) (purpose and intent of BAPCPA is to ensure that those debtors who can pay their debts do so).

BAPCPA attempts to accomplish this goal through 11 U.S.C. § 707. Section 707 provides for a "means test" to determine whether debtors have the means to pay creditors. The first step in the calculation is to determine whether a debtor's annual current monthly income pursuant to section 101(10A) ("CMI") is lower than the state median income for a household of the same size. If a debtor's CMI is below the median, the debtor "passes" the test and may proceed in a Chapter 7 case. 11 U.S.C. § 707(b)(7).

If the debtor's CMI is greater than the state median income, then the debtor must go through the income analysis of section 707(b)(2) by completing and filing a Statement of Current Monthly Income and Means Test Calculation-Form B22A (the "Official Form B22A"). In the Official Form B22A, a debtor's CMI is reduced by expenses allowed in section 707(b)(2)(A)(ii)-(iv) to determine how much of the debtor's monthly income is available to creditors. A debtor "passes" the means test if the debtor has less than $100 per month in monthly net income, as more fully described in section 707(b)(2)(A).[FN1] If a debtor's Official Form B22A shows that the debtor has enough disposable income to pay creditors pursuant to the formula of section 707(b)(2)(A), the debtor does not pass the means test, and the "presumption of abuse" arises.FN2

*2 Section 707(b)(1) provides that, after notice and a hearing, the Court may dismiss a case filed by an individual whose debts are primarily consumer debts if it finds that granting relief would be an abuse of the provisions of Chapter 7.[FN3] The UST seeks dismissal of Debtor's bankruptcy case as an abuse of the provisions of Chapter 7 pursuant to 11 U.S.C. § 707(b)(1) based on the presumption of abuse arising under 11 U.S.C. § 707(b)(2).

The deduction at issue in this matter is in section 707(b)(2)(A)(iii) w hich allows a deduction for the average monthly payment on secured debt for "all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition."

1. On June 30, 2006, Stacey **Benedetti** ("Debtor") filed a voluntary petition for relief under Chapter 7 of Title 11, United States Code (the "Bankruptcy Code"). Debtor's petition is subject to the BAPCPA.[FN4]

2. On the date of filing, Debtor filed her Schedules, Statement of Financial Affairs, Statement of Intention, and her Official Form B22A.

3. Debtor is a single woman, who listed two leased vehicles in schedule B: a 2005 Audi A4 Cabriolet, 2 Door ("Audi"), and a 2006 BMW-Z-4 ("BMW").

4. On her Official Form B22A, Debtor calculated her CMI in the amount of $5,509.86. Thereafter, she deducted a number of expenses from her CMI, including $1,052.55 on Line 42 for "future payments on secured claims", $1,017.31 of which relates to the monthly lease payments for the Audi in the amount of $642.31, and the monthly lease payments for the BMW in the amount of $375.00.

5. Pursuant to section 704(b)(1) of the Bankruptcy Code, the UST filed a statement that Debtor's case is presumptively abusive under section 707(b) (the "Statement of Presumed Abuse"), noting that:
a. On Schedule B, Debtor disclosed an interest in the Audi and the BMW;
b. On Schedule G, Debtor listed the lease for the Audi and indicated her intent to surrender same;

c. Debtor's Statement of Intent indicated her intent to reaffirm the BMW lease, but to surrender the Audi;
d. At the § 341 Meeting of Creditors held on August 1, 2006, the Debtor testified that she was surrendering the Audi.[FN5]

6. Based upon the foregoing information, the UST eliminated Debtor's claimed expense relating to the property Debtor intended to surrender, and adjusted other expenses.[FN6]

7. The UST subsequently filed her Motion to Dismiss on September 7, 2006 (DE # 22).

8. At the hearing on the UST's Motion to Dismiss, the Court took the dispositive issue in this matter under advisement, that is, whether Debtor may include in the means test calculation the installment payments on the Audi she surrendered after filing the petition commencing this case. The UST's Motion to Dismiss with respect to all other objections was continued pending a resolution of the surrender issue.

The UST objects to Debtor including the installment payments on the surrendered Audi in her means test form because, as the UST argues, the plain language of 11 U.S.C. § 707(b)(2)(A)(iii), "scheduled as contractually due to a secured creditor in each of the 60 months following the date of the petition", does not allow Debtor to deduct payments on secured debt which she is not making post-petition. To allow such deduction would be contrary to the plain meaning and purpose of the statute.

*3 On the other hand, the Debtor argues that the expense portion of the means test requires the Court to determine what payments are "secured" and "contractually due" as of the petition date, without any reference to post-petition events. The Debtor asserts the means test is an historic, not futuristic, mathematical test which uses historical data, with no qualification, condition or exception for situations such as the surrender of collateral.

Pursuant to section 707(b)(2), the presumption of abuse arises in this case if Debtor's deduction of the payments on the surrendered Audi in her Official Form B22A is disallowed, because the Debtor would have approximately $642.00 per month in disposable income. Debtor does not dispute that the presumption arises if she is not allowed to deduct the payments on the Audi.

The provisions of 11 U.S.C. § 707(b)(2)(A) guide the Court in its determination of what constitutes reasonably necessary expenses which may be deducted from a debtor's current monthly income for purposes of arriving at the debtor's disposable income. Section 707(b)(2)(A)(iii) provides, in pertinent part, that:
[t]he debtor's average monthly payments on account of secured debts shall be calculated as the sum of-
(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition....

[1][2][3] The parties agree that the determination of what amounts may be deducted from CMI under this provision begins with the language of the statute itself. *In re T.H. Orlando, Ltd.,* 391 F.3d 1287, 1291 (11th Cir.2004); *see, In re Anderson,* 275 B.R. 922, 925 (10th Cir.BAP2002) citing *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989); and *Dalton v. I.R.S.,* 77 F.3d 1297, 1299 (10th Cir.1996); " 'The plain meaning of legislation should be conclusive, except in the rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"*In re Paschen,* 296 F.3d 1203, 1207 (11th Cir.2002) quoting *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989); *see In re Carbaugh,* 278 B.R. 512, 522 (10th Cir.BAP2002). In determining the plain meaning, a court "gives effect to every clause and word of [the] statute."*Negonsott v. Samuels,* 507 U.S. 99, 106, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993) quoting *Moskal v. U.S.,* 498

U.S. 103, 109-110, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). As the Supreme Court has stressed, "statutory construction is a 'holistic endeavor.' "*Koons Buick Pontiac GMC, Inc. v. Nigh,* 543 U.S. 50, 60, 125 S.Ct. 460, 160 L.Ed.2d 389 (2004) quoting *United Sav. Assn. of Texas v. Timbers Inwood Forest Associates, Ltd.,* 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)."In interpreting one part of a statute, 'we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'"*In re Welzel,* 275 F.3d 1308, 1317 (11th Cir.2001) quoting *Philbrook v. Glodgett,* 421 U.S. 707, 713, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975); *see also FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)(courts must "interpret the statute as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into a harmonious whole.").

***4** However, by "simply" interpreting the "plain" language of the statute, two lines of cases have emerged on the issue of whether a secured debt for collateral that a debtor intends to surrender is "scheduled as contractually due" for purposes of the means test under 11 U.S.C. § 707(b)(2)(A)(iii)(I). The cases of *In re Walker,* 2006 WL 1314125 (Bankr.N.D.Ga.2006), *In re Oliver,* 2006 WL 2086691 (Bankr.D.Ore.2006) and *In re Hartwick,* 352 B.R. 867 (Bankr.D.Minn.2006) found the statute permits debtors to include payments on surrendered collateral in the means test calculation. The *Walker* court allowed the expense, ruling that the plain meaning of the phrase "scheduled as contractually due" *does* permit debtors to reduce CMI for payments owed pursuant to an underlying contract, regardless of whether the debtor has indicated an intent to surrender the property.2006 WL 1314125 at *3-4.

The cases of *In re Skaggs,* 349 B.R. 594 (Bankr.E.D.Mo.2006), *In re Love,* 350 B.R. 611 (Bkrtcy.M.D.Ala.2006), *In re Crittendon,* 2006 WL 2547102 (Bankr.M.D.N.C.2006), *In re Edmunds,* 350 B.R. 636 (Bankr.D.S.C.2006) and *In re Harris,* 353 B.R. 304 (Bankr.E.D.Okla.2006) all found that the secured debts for surrendered collateral are *not* included in the means test calculation.

[4] Upon review of all the cases and the language of the applicable statute itself, the Court is persuaded by the thorough and well-reasoned opinion of United States Bankruptcy Judge W. Homer Drake, Jr. in *Walker,* and agrees that the plain meaning of the phrase "scheduled as contractually due" found in section 707(b)(2)(A)(iii) of the Bankruptcy Code entitles the Debtor to deduct from current monthly income the average payments on debts secured by collateral which the Debtor intends to surrender post-petition. The words in 11 U.S.C. § 707(b)(2)(A)(iii), when read together as a whole, lead the Court to believe that a secured debt "scheduled as contractually due to secured creditors" does not require, as a prerequisite to allowing the deduction, that those debts *actually* be paid "in each month of the 60 months following the date of the petition."Section 707(b)(2)(A)(iii) directs a deduction for all of the debt that will become contractually due in the five years after the filing of the bankruptcy case, without regard to whether the property securing the debt is necessary and without regard to whether the payments are actually made. *See* Wedoff, *Means Testing in the New § 707(b),* 79 Am. Bankr.L.J. 231 ("for purposes of the means test, debt secured even by such items as luxury vehicles, pleasure boats and vacation homes would be deductible.").

The UST relies on the statutory scheme of BAPCPA to argue that, in calculating disposable income, the Court should not allow a deduction for future payments that are not actually paid. The UST contends the statute does not allow the deduction from CMI of the $642.31 amount for the Audi, because the Debtor stated her intent to surrender the Audi, has actually done so as of the date of the UST's Motion to Dismiss, and will not make any payments thereon in any of the 60 months following her petition date. The UST argues that the means test provides a mechanism for assessing a debtor's ability to repay his or her debts in the 60 months following the petition date, and calculates whether a debtor's average monthly income, less

allowable expenses, would result in sufficient disposable income in the five years after the bankruptcy filing such that the court should presume that the case is abusive. She concludes that, in calculating a debtor's disposable income in the months after filing, the means test was not intended to include amounts that a debtor *will not pay* to secured creditors in that same 60 month period.

***5** [5] The UST's position hinges on legislative intent and policy and is based upon notions of fairness and statutory interpretation which she believes best serves the purposes of 11 U.S.C. § 707(b)"as a gate-keeper to the sanctuary of Chapter 7. That is, to keep debtors who can afford to pay a portion of their debts out."*Hartwick,* 352 B.R. at 869.However, United States Bankruptcy Judge Dennis D. O'Brien's response to this argument in *Hartwick* is fitting:

[C]oncepts of fairness involve equitable principles and judicial discretion. Congress had neither of these in mind in enacting the means test in 11 U.S.C. § 707(b). The means test presents a backward looking litmus test performed using mathematical computation of arbitrary numbers, often having little to do with a particular debtor's actual circumstances and ability to pay a portion of debt. Congress has already determined the fairness of application of the means test, and a major objective of the legislation was to remove judicial discretion from the process.

Thus, if Congress intended to limit secured debt payments contractually due from debtors on the petition date to those where actual future payments will be made in Form B22C calculations, it knew how to do so, as reflected by the inclusion of the terms "actual monthly expenses" and "actual expenses" elsewhere within 11 U.S.C. § 707(b)(2)(A)(ii)(I) and (II).*Oliver,* 2006 WL 2086691.

[6] The Debtor emphasizes that section 707(b)(2) computes disposable income by looking backward from the filing date to the debtor's income and expenses in the six months prior to filing. *Walker,* 2006 WL 1314125 at *5 ("Congress chose to base the means test on historic income and expense figures that are in effect on the petition date, as opposed to figures that may change with the passage of time or with changes in the debtor's lifestyle. This choice indicates an intent to apply the means test to measure the debtor's need for chapter 7 relief at the time of filing, without regard to future events....").*See also In Re Hartwick,* 352 B.R. at 867 (agreeing with *Walker* in that the means test presents a backward looking test). Although the court in *Love* disagreed with *Walker* and held that the language of section 707(b)(2)(A)(iii) is forward looking and the term "scheduled payments" indicates a forecast of future events and not historic data, *Love,* 350 B.R. at 613-14, the Debtor points out that comparing historical income data with futuristic expenses is "nonsensical". The Court agrees with the Debtor. *See In re Edmunds,* 350 B.R. 636 (Bankr.D.S.C.2006)."Congress chose to base the means test on historic income and expense figures that are in effect on the petition date, as opposed to figures that may change with the passage of time or with a change in the debtor's lifestyle. This choice indicates an intent to apply the means test to measure the debtor's need for Chapter 7 relief *at the time of filing,* without regard to future events or relief that would be available under Chapter 7."*Walker,* 2006 WL 1314125 at *5 (emphasis added).*See*11 U.S.C. § 707(b)(2)(A)(ii) and (iii).

***6** Using a "snapshot" view of the Debtor's expenses on the date of filing makes sense in the context of a Chapter 7 case. The application of the provisions of section 707(b)(2) involves an evaluation of the Debtor's financial condition on the petition date such that a post-petition surrender of collateral is irrelevant and inconsequential. The means test is statutorily defined as a mechanism for determining whether a presumption of abuse arises in a Chapter 7 case, with reference to expenses "as in effect on the date of the order for relief."11 U.S.C. § 707(b)(2)(A)(i) and (ii). The test has been described as a "snapshot" on the petition date rather than an evolving progress report on the Debtor's finances. *See In re Nockerts,* 357 B.R. 497

(Bankr.E.D.Wis.2006). Thus, as long as the Debtor, at the time she filed her petition, was contractually obligated to pay the secured creditor on the Audi, in some or all of the sixty months subsequent to the petition date, and as long as no other event occurred to relieve the Debtor of her contractual obligations to make the scheduled payments, the payments were still "scheduled as contractually due" on the date of the petition, and the Debtor is therefore allowed to deduct the average of those payments.

Like beauty, the plain meaning of BAPCPA is in the eye of the beholder, creating a body of case law with opposing conclusions regarding whether section 707(b)(2)(A)(iii) allows a debtor to reduce his or her CMI on account of payments that may never be made. The Court finds that the plain meaning of the statute requires debtors to use the expenses in effect as of the petition date, allowing them to deduct average monthly payments for secured debts, despite the fact that they have surrendered or will surrender the collateral securing those debts. *See*11 U.S.C. § 707(b)(2)(A)(ii) and (iii). In determining which payments should be averaged for the deduction, the Court determines how many payments are owed under the contract for each secured debt at the time of filing. "This interpretation gives meaning to the word 'scheduled,' which implies the possibility that the payments may not be made as required under the contract...."*Walker,* 2006 WL 1314125 at *4. Accordingly, the Court will allow, for purpose of the means test calculation, a deduction from CMI for amounts that would have been due, but which Debtor may not pay, to secured creditors on account of property she intends to, and in fact does surrender after the petition date. It is hereupon

ORDERED AND ADJUDGED that the UST's Motion is **DENIED IN PART** as follows:
1) Debtor's lease payments on the surrendered Audi in her Official Form B22A are allowed.
2) The UST's Motion is reset for hearing on August 9, 2007 at 11:30 AM in Courtroom 1410, 51 SW First Ave., Miami, FL to consider the remaining objections in the Motion.

FN1.Section 707(b)(2)(A)(i) of the Bankruptcy Code requires the court to presume that a debtor's Chapter 7 filing is abusive "if the debtor's current monthly income reduced by amounts determined under clauses (ii), (iii), and (iv) [of § 707(b)(2)(A)], and multiplied by 60 is not less than the lesser of-
(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or
(II) $10,000."
Stated differently, if after deducting all allowable expenses from a debtor's current monthly income, the debtor has less than $100 per month in monthly net income (*i.e.,* less than $6,000 to fund a 60 month plan), the filing is not presumed abusive. If the debtor has monthly income of more than $166.67, or $10,000 to fund a sixty month plan, the filing is presumed abusive. Finally, if the debtor has between $101 and $166 per month, the case will be presumed abusive if that sum, when multiplied by 60 months, will pay 25% or more of the debtor's non-priority unsecured debts.

FN2. The presumption of abuse may be rebutted by a debtor by showing special circumstances pursuant to section 707(b)(2)(B).

FN3. Debtor in this case is an individual with primarily consumer debts. Consumer debts are those "incurred by an individual primarily for a personal, family or household purpose."11 U.S.C. section 101(8). The majority of Debtor's indebtedness is credit card debt, and is therefore consumer in nature. *See In re Stewart,* 175 F.3d 796, 808 (10th Cir.1999) ("primarily" in the context of section 707(b) means consumer debt exceeding fifty percent of the total debt.) Debtor also acknowledges the nature of her debt to be "consumer/non-business" on the voluntary petition.

FN4. The BAPCPA is effective as to cases filed on or after October 17, 2005.

FN5. In fact, post-petition, on September 6, 2006, VW Credit, Inc. filed its Notice of Termination of Automatic Stay By Operation of Law with regard to the Audi. (DE # 23).

FN6. In her Motion to Dismiss, the UST objected to other expenses that Debtor included in her Official Form B22A. For the purposes of this decision and in formulating her determination that the presumption of abuse arises, the UST is not considering whether those additional expenses are properly allowed. The only expense presently at issue is the payments on the surrendered Audi. The remaining UST's objections are continued pending a resolution of the surrender issue.

Bkrtcy.S.D.Fla.,2007.
In re Benedetti
--- B.R. ----, 2007 WL 2083576 (Bkrtcy.S.D.Fla.), 20 Fla. L. Weekly Fed. B 484

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(Cite as: Slip Copy)

In re Meza
E.D.Cal.,2007.

United States District Court,E.D. California.
In re Monique D. MEZA, Debtor.
Sara L. Kistler, Acting United States Trustee, Region 17, Appellant,
v.
Monique D. Meza, Appellee.
No. 2:06cv1307 MCE.
Bk. No. 06-20291-C-7.

June 25, 2007.

Judith C. Hotze, Sacramento, CA, for Appellant.
Robert R. Schaldach, Law Offices of Robert R. Schaldach, Sacramento, CA, for Appellee.

MORRISON C. ENGLAND, JR., United States District Judge.
***1** The United States Trustee ("Trustee") [FN1] appeals the bankruptcy court's denial of its Motion to Dismiss Debtor Monique Meza's ("Meza") bankruptcy petition pursuant to 11 U.S.C. § 109(h) (hereinafter § 109(h)).

FN1. United States Trustees are officials of The Department of Justice, appointed by the Attorney General to supervise the administration of bankruptcy cases. *See*28 U.S.C. §§ 561-589.

Specifically, Trustee moved to dismiss due to Meza's failure to obtain pre-petition creditcounseling and properly file a certificate regarding the same, as required by § 109(h). The bankruptcy court declared Trustee's Motion untimely in light of the prior meeting of creditors and specific circumstances surrounding Meza's petition. For the reasons set forth below, the bankruptcy court's decision is affirmed.[FN2]

FN2. Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

Meza contracted with Debt Free CreditCounseling Service ("Debt Free"), a consumer debt consolidation service, in November of 2004. Meza made approximately one year's worth of payments to her creditors under Debt Free's plan. Meza terminated the program around January of 2006, resulting in a confirmation letter from Debt Free dated February 2, 2006. Meanwhile, on October 17, 2005, the Bankruptcy Abuse Protection and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. No. 109-8, 119 Stat. 23 (2005) was enacted. BAPCPA contains provisions which provide that an individual is not eligible to apply for bankruptcy protection unless he or she has obtained creditcounseling from an approved provider no more than 180 days prior to filing the bankruptcy petition. 11 U.S.C. § 109(h).

Meza filed a petition for bankruptcy under 11 U.S.C. Chapter 7 on February 9, 2006, less than four months after the new BAPCPA creditcounseling provisions went into effect. Meza filed documents required by 11 U.S.C. § 521(a), but failed to include a certificate of debt counseling as required by § 521(b). However, Meza indicated that she had obtained such counseling on page 2 of Form B1. Excerpts of Record Of Appellant ("EOR") A6.

The bankruptcy court clerk issued a notice of incomplete filing on February 9, 2006. The notice indicated that the missing Certificate of CreditCounseling was to be received by February 24, 2006.

The clerk noticed all scheduled creditors of the March 10, 2006 meeting of the creditors on February 10, 2006.

Meza applied to extend the deadline to submit her certificate of creditcounseling on February 28, 2006. The bankruptcy court granted the extension notwithstanding the four-day gap between the

expiration of the period set by the clerk and the date of the application.

Meza filed the missing certificate on March 7, 2006. Meza certified that she was in compliance with § 109(h) because she had received debt counseling prior to the enactment of BAPCPA, thereby qualifying under a waiver provided by 11 U.S.C. § 109(h)(3)(A). Three days later, the creditor meeting was completed.

Trustee filed the Motion to Dismiss pursuant to § 109(h) on March 17, 2006. The bankruptcy court denied the Motion, holding it untimely in light of the circumstances, including a finding that Meza had substantially complied with § 109(h) requirements. Trustee now appeals this denial.

***2** An appellant may petition the district court for review of a bankruptcy court's decision. Fed. R. Bankr.P. 8013. The applicable standard of review is identical to that employed by circuit courts of appeal in reviewing district court decisions. *See Heritage Ford v. Baroff (In re Baroff),* 105 F.3d 439, 441 (9th Cir.1997). Legal conclusions are renewed on a de novo basis, and factual determinations are assessed pursuant to a "clearly erroneous" standard. *Murray v. Bammer (In re Bammer),* 131 F.3d 788, 792 (9th Cir.1997) (en banc).

Findings of fact are "clearly erroneous" only if the reviewer of fact is "left with the definite and firm conviction that a mistake has been committed."*In re Marquam Inv. Corp.,* 942 F.2d 1462, 1466 (9th Cir.1991) (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). The appellant has the burden of proof in convincing the reviewing court that such error has been committed, and the reviewing court should not reverse simply because another decision could have been reached. *In re Windsor Indus., Inc.,* 459 F.Supp. 270, 275 (N.D.Tex.1978).

1. Meza's Eligibility to File for Bankruptcy

In the Motion to Dismiss, Trustee argued that Meza was ineligible to petition for bankruptcy because she did not satisfy eligibility requirements set out in § 109(h). Trustee viewed the requirements as a jurisdictional barrier to a bankruptcy court hearing a petition. The bankruptcy court disagreed, instead construing § 109(h) as an element of a federal claim.

The bankruptcy court compared the instant case to *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), in which the Supreme Court examined the nature of claims brought under Title VII. There, the Supreme Court found the 15-employee threshold to be an ingredient of a claim for relief, rather than a jurisdictional element. This Court agrees that the *Arbaugh* holding can properly be analogized to the initial question confronted by the bankruptcy court herein: namely, whether or not compliance with § 109(h) constitutes a jurisdictional prerequisite or instead simply amounts to a factual element that must be satisfied in order to assert a cognizable claim in bankruptcy.

Examining the eligibility requirements of § 109(h), the bankruptcy court explicitly found that it did "not relate to subject-matter jurisdiction, period."EOR A137-38. Given the non-jurisdictional nature of the eligibility requirements, the bankruptcy court properly found that any opposition to a bankruptcy petition on § 109(h) grounds would be waived unless raised in a timely manner.

The bankruptcy court proceeded to address the timeliness of the Trustee's Motion to Dismiss under the particular circumstances of this case. Those findings will be discussed below.

2. Findings of the Bankruptcy Court

The bankruptcy judge made a mixed finding of law and fact in denying Trustee's Motion to Dismiss. The court declared Trustee's Motion to be untimely in part because it was filed subsequent to the meeting of creditors, and in part due to Meza's substantial compliance with § 109(h). While the

finding of law that a motion to dismiss filed subsequent to a meeting of creditors is unsupported, the findings of fact of substantial compliance are not clearly erroneous, and must be upheld.

A. Findings of Law

*3 Nothing in the Federal Rules of Bankruptcy Procedure or Title 11 of the United States Code specifies timeliness requirements for a motion to dismiss for failure to satisfy § 109(h). The picture becomes even more clouded in the instant case, where Meza obtained creditcounseling services prior to enforcement of the BAPCPA provision mandating counseling within 180 days of filing her petition in bankruptcy.

11 U.S.C. § 707 provides some assistance in determining the ability of the court to dismiss Chapter 7 petitions. Courts may on their own motion dismiss for cause petitions that are accompanied by unreasonable delay by the debtor or lack the appropriate filing fee. 11 U.S.C. § 707(a). On a motion by the United States Trustee, the court may dismiss petitions that lack documents required by 11 U.S.C. § 521(a).11 U.S.C. § 707(a)(3). Significantly, no time limits are placed upon such motions to dismiss.

The court may also dismiss a petition for substantial abuse under 11 U.S.C. § 707(b) on motion by the court or the United States Trustee. Such a motion must be filed within 60 days after the first date set for the meeting of creditors. Fed. R. Bankr.P. 1017(e).

These allowances for filing motions to dismiss would seem to allay the concerns of the bankruptcy court regarding deleterious effects on creditors and debtors of a petition's dismissal. Specifically, the court postulated that dismissals might disadvantage creditors who abide by the automatic stay afforded by 11 U.S.C. § 362. EOR A140. A dismissal would result in a race to a debtor's assets, potentially harming creditors who refrained from pursuing the debtor's estate in reliance on § 362. Given the statutory allowance for dismissals after a creditors' meeting, however, a finding of untimeliness for a motion filed a week after the meeting of creditors is unwarranted. That finding is nonetheless not dispositive of the Court's inquiry herein, since the bankruptcy court's ultimate decision rested on factual findings above and beyond the timing of the Trustee's actual Motion to Dismiss itself.

B. Findings of Fact

The bankruptcy court found Meza's petition to substantially comply with the eligibility requirements of § 109(h). While the counseling was provided by an un-approved service and was received more than 180 days prior to filing, the court found Meza eligible to file for bankruptcy.

Meza initiated creditcounseling in November of 2004, roughly five months prior to enactment of BAPCPA. At that time, there was no requirement for the petitioner to obtain pre-petition counseling from an approved provider within 180 days prior to filing for bankruptcy. While Meza's actual petition was filed after enforcement of BAPCPA, the counseling resulted in the type of debt repayment contemplated by Congress in writing the statute. EOR A134. The court construed Meza's debt repayments, which continued until November of 2005, as "briefings" within the meaning of § 109(h).*Id.* In light of the exceptional circumstances regarding Meza's actions and the intervening enactment of BAPCPA, the court found the "constellation of facts" to weigh in favor of a finding that Meza substantially complied with § 109(h).[FN3] EOR A147.

> FN3. Both Trustee and Debtor raise the issue of Debtor's qualification for a waiver of the eligibility requirements as provided by 11 U.S.C. § 109(h)(3)(A). The bankruptcy court's declaration of substantial compliance with § 109(h) renders such waiver analysis unnecessary.

*4 The bankruptcy court additionally found Meza's petition satisfactory in general. The court declared payment of the filing fee and completion of post-petition counseling to weigh heavily in comparison with pre-petition creditcounseling. The court

thought debtors were "... in a much better position to benefit from the [post-petition] training," due to completion of creditor schedules filed with their petition. EOR A150. This determination, coupled with Meza's substantial compliance with § 109(h), led the court to the conclusion that requiring Meza to undergo a second course of counseling before filing for bankruptcy is unnecessary.

This Court cannot determine, as it must to warrant reversal on appeal, that the bankruptcy court's finding of substantial compliance with eligibility requirements constituted clear error. The record supports the bankruptcy court's conclusion that Meza's conduct was sufficient to satisfy § 109(h) eligibility requirements and petition for voluntary Chapter 7 bankruptcy.

Based on all the foregoing, the decision of the bankruptcy court is hereby AFFIRMED.

E.D.Cal.,2007.
In re Meza
Slip Copy, 2007 WL 1821416 (E.D.Cal.), Bankr. L. Rep. P 80,965

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of *Pro–Snax* is directed to professionals for the debtor who knew that their efforts were futile, and therefore any time incurred by them was unreasonable at the time the fees were incurred. H & L, as counsel to the Equity Committee, had fiduciary duties to its constituents, which it clearly fulfilled. At the time such services were rendered, they were reasonable.

Under separate order, this Court has allowed the fees and expenses of H & L through December 13, 2004, the date it became clear that the Equity Committee's plan would not be confirmed.

In re Paul JONES, Christina Jones, Debtors.

No. 06–33790.

United States Bankruptcy Court, S.D. Texas, Houston Division.

Oct. 20, 2006.

Background: United States Trustee (UST) moved to dismiss debtors' Chapter 7 case on ground that debtors, having obtained credit counseling more than 180 days prior to commencement of their bankruptcy case, were not in compliance with "credit counseling" requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).

Holdings: The Bankruptcy Court, Wesley W. Steen, J., held that:

(1) bankruptcy court had no discretion to waive or modify eligibility requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), that debtors obtain credit counseling "during the 180-day period preceding the date of filing of the petition"; and

(2) appropriate disposition, upon determination that Chapter 7 debtors had failed to comply with eligibility requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), in having failed to obtain credit counseling "during the 180-day period preceding the date of filing of the petition," was entry of order dismissing, and not striking, bankruptcy case.

Motion granted; case dismissed.

1. Bankruptcy ⇐2222.1

Bankruptcy court had no discretion to waive or modify eligibility requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), that debtors obtain credit counseling "during the 180-day period preceding the date of filing of the petition," in order to allow Chapter 7 case to proceed, though debtors, in obtaining credit counseling 190 days prior to petition date and delaying their filing in attempt to implement the lessons learned during that counseling, had certainly complied with spirit, if not the literal terms, of this eligibility provision. 11 U.S.C.A. § 109(h)(1).

2. Bankruptcy ⇐2222.1

Chapter 7 debtors who had not requested credit counseling services immediately prior to filing their petition, and who could not certify that they were unable to obtain such counseling within five-day period prior to filing of petition, could not come within the narrow "exigent circumstances" exception to credit counseling requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protec-

tion Act (BAPCPA). 11 U.S.C.A. § 109(h)(3).

3. Bankruptcy ⇐2261

While it would seem that, to extent that the United States Trustee (UST) had any discretion not to file motion to dismiss bankruptcy case filed by debtors that failed to comply with literal terms of prepetition credit counseling requirement, the resources of UST's office might be better spent than moving to dismiss bankruptcy case filed by debtors who had in fact obtained prepetition credit counseling, but simply waited too long to file their petition in attempt to implement the lessons learned during this credit counseling, bankruptcy court had no discretion, once motion to dismiss was filed, but to dismiss debtors' petition. 11 U.S.C.A. § 109(h)(1).

4. Bankruptcy ⇐2257, 2261

Appropriate disposition, upon determination that Chapter 7 debtors had failed to comply with eligibility requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), in having failed to obtain credit counseling "during the 180-day period preceding the date of filing of the petition," was entry of order dismissing, and not striking, bankruptcy case; petition filed by these ineligible debtors was nonetheless sufficient to commence bankruptcy case. 11 U.S.C.A. § 109(h)(1).

5. Bankruptcy ⇐2222.1

Bankruptcy eligibility requirements are not jurisdictional. 11 U.S.C.A. § 109.

Frank S. Steelman, Attorney at Law, Bryan, TX, for Debtors.

MEMORANDUM OPINION FINDINGS AND CONCLUSIONS DISMISSING CASE

WESLEY W. STEEN, Bankruptcy Judge.

Debtors completed credit counseling on January 24, 2006. Debtors did not file their petition initiating this chapter 7 bankruptcy case until August 2, 2006, which is approximately 190 days after they completed credit counseling. Debtors are not eligible for bankruptcy relief because they did not satisfy the requirements of 11 U.S.C. § 109(h) (Debtors did not complete a credit counseling course within 180 days prior to filing a voluntary bankruptcy petition). The U.S. Trustee filed a motion to dismiss the case. Because Debtors did not satisfy the statutory requirements for bankruptcy relief, and because the Court finds that it has no discretion in the matter, the case is dismissed. The Court is aware of jurisprudence that holds that the Court should "strike" or "dismiss" the petition rather than dismiss the case, but the Court concludes that the proper disposition is to dismiss the case. The Court recognizes, with regret, that this decision creates a split between bankruptcy judges in this district; therefore the Court will certify the matter for appeal under 28 USC § 158(d)(2) if the parties seek that relief.

FACTS

There is no dispute that Debtors completed their credit counseling course 190 days before the date that they filed their bankruptcy case.[1] The Court will accept as true, for purposes of this decision, the allegations in Debtors' "Certified Statement".[2] In that statement, Debtors allege

1. Docket ## 9, 11.

2. Attached to docket # 11.

several reasons why they think the Court should accept the stale credit counseling certificate as sufficient. Since those allegations are insufficient as a matter of law, the Court need not hold a hearing.

ANALYSIS

A. Counseling 190 Days Prior to Filing a Bankruptcy Case Does Not Meet Statutory Requirements

[1] To avail himself or herself of bankruptcy relief, an individual debtor must receive credit counseling within the 180–day period preceding the filing of the bankruptcy case. Bankruptcy Code § 109(h) states:

> [A]n individual may not be a debtor under this title unless such individual has, during the 180–day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing ... that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

11 U.S.C. § 109(h)(1). *See also,* H.R.Rep. No. 109–31, at 54 (2005), U.S.Code Cong. & Admin.News 2005, pp. 88, 175.

The Bankruptcy Code does not give the bankruptcy judge discretion to waive or to modify that requirement.

[2] There is a statutory exception to the requirement, but that statutory exception is exceptionally narrow. To be exempt from the credit counseling requirement of § 109(h)(1), a debtor must file a certificate of exigent circumstances. The certification must state that "the debtor requested credit counseling services ... but was unable to obtain the services ... during the 5–day period beginning on the date on which the debtor made that request." 11 U.S.C. § 109(h)(3).

Debtors have submitted to the Court a Certified Statement that describes exigent circumstances. Debtors seek a waiver of the credit counseling requirement or a ruling that the facts alleged in the certificate satisfy the credit counseling requirement. In the Certified Statement, Debtor Christina Jones alleges:

1. That she and her husband consulted counsel on January 19, 2006, for advice about filing a bankruptcy case;
2. That they immediately (January 24, 2006) took a credit counseling course;
3. That they could not pay counsel's fee at that time, so they delayed filing their bankruptcy petition;
4. That they implemented the credit counseling advice and hoped that they could avoid bankruptcy;
5. That circumstances, including family illness, intervened and Debtors "forgot all about the Bankruptcy[;]"
6. That when bankruptcy relief became necessary, they had difficulty getting financial data from Mr. Jones' employer and had difficulty getting information to file their income tax returns; and
7. That an additional $40 for an additional course of credit counseling and an additional fee of $299 for filing another bankruptcy case would be a burden.

Debtors did not state that they requested credit counseling services immediately prior to filing the case. They cannot certify that they were not able to obtain the services within the 5–day period prior to filing the petition. Therefore they do not meet the requirements for the exemption from credit counseling.

The Court has considered *In re Bricksin*, 346 B.R. 497 (Bankr.N.D.Cal.2006). The Bricksins received credit counseling on October 19, 2004 and decided not to pursue bankruptcy relief. Instead, they arranged a payment plan for creditors through the credit counseling agency. Payments under the plan continued through July 2005, but after that date the Bricksins were unable to continue the payment plan. Debtors filed for bankruptcy protection on November 22, 2005. The court determined that Congress' objective in requiring counseling was to enable debtors to make an informed choice about bankruptcy alternatives and about the consequences of the various alternatives. *Id.* at 501 (*citing* H.R.Rep. No. 109-031, at 2 (2005)). Although over a year had passed since the Bricksins received counseling, the court concluded that the Bricksins were in compliance with the spirit of the law because the debt repayment plan constituted ongoing credit counseling sufficient to satisfy the statutory requirement on the specific, unusual facts of that case. While legal philosophies differ on whether a debtor must comply with the "spirit" or the "letter" of a law, the result in *Bricksin* satisfies both (unless the findings of fact are vacated or reversed) since the Court explicitly found that participation in the credit counseling program constituted ongoing credit counseling. That is not the situation in the case at bar.

[3] If the Court were permitted any discretion about whether Debtors' exigent circumstances were valid cause for a 10 day extension of time, the Court would exercise that discretion in favor of allowing this bankruptcy case to continue. And if the U.S. Trustee has any discretion (akin to "prosecutorial discretion" in other functions of the Justice Department), the Court would hope that the U.S. Trustee would decline to prosecute a motion to dismiss under the circumstances presented in this case. A debtor who obtains credit counseling only 190 days prior to filing a bankruptcy petition and who delays filing a bankruptcy petition to try to implement the lessons learned in counseling certainly seems to meet the objective of the statute, if not the literal requirement. And unless the U.S. Trustee has unlimited resources, it would seem that limited resources would be better put to other litigation. But the U.S. Trustee has filed a motion to dismiss in this case and Congress allowed bankruptcy judges no discretion. Therefore the Court will fulfill its obligation to rule on the motion under the requirements set out in the statute as they apply to the facts in this case. The Court concludes that the Debtors are not eligible to be debtors in this case.

B. Dismiss the case, strike the petition, or dismiss the petition

[4] Having reached these conclusions, the Court must determine the proper disposition of the U.S. Trustee's motion to dismiss. There is a split in the jurisprudence regarding whether the appropriate disposition is dismissal of the case, striking the petition, or dismissing the petition.

1. The Nullity Jurisprudence

a. Hubbard and the Logic of "Striking" the Petition

Bankruptcy Code § 101(42) defines "petition" as a "petition filed under section 301, 302, 303 or 304 ... commencing a case under this title." Bankruptcy Code § 302 states that a case is "commenced by the filing ... of a single petition ... by an individual that may be a debtor under such chapter and such individual's spouse." Some courts conclude that since only an "eligible debtor" may file a petition and commence a case, a petition filed by a person who is not an eligible debtor fails to

commence a case. *See, In re Hubbard*, 333 B.R. 377 (Bankr.S.D.Tex.2005), *reconsideration denied, In re Salazar*, 339 B.R. 622 (Bankr.S.D.Tex.2006), *appeal denied* as moot when parties settled, 193 Fed. Appx. 281 (5th Cir.2006). *See also, In re Rios*, 336 B.R. 177 (Bankr.S.D.N.Y.2005); *In re Valdez*, 335 B.R. 801 (Bankr.S.D.Fla. 2005); *In re Elmendorf*, 345 B.R. 486 (Bankr.S.D.N.Y.2006); *In re Thompson*, 344 B.R. 899 (Bankr.S.D.Ind.2006); *In re Carey*, 341 B.R. 798 (Bankr.M.D.Fla.2006).

> The debtors were not eligible to file bankruptcy. Accordingly, the filing of their voluntary petitions did not commence cases under chapter 13....
>
> ....
>
> As set forth above, no "case" was commenced by the filing of these petitions. Because no case was commenced under § 301, there is no "case" to dismiss. The petitions in these five cases are stricken.

Hubbard, 333 B.R. at 388.

b. The Salazar Modification of the Hubbard Analysis

Hubbard was a combined ruling on 6 cases. One of those cases was filed by Mr. and Mrs. Salazar, who asked for reconsideration of the *Hubbard* ruling. The Salazars argued that although *Hubbard* eases a debtor's burden in a successive filing if a debtor corrects the credit counseling error prior to filing the successor case, the *Hubbard* analysis creates uncertainty about the existence of the automatic stay until the court decides whether (or not) the debtor was eligible to file the first petition. Under *Hubbard*, if the court strikes the petition and renders it a nullity, creditors can reasonably argue that any action that they took prior to the end of the case did not violate the automatic stay. Mr. and Mrs. Salazar argued that this uncertainty and ambiguity should be eliminated by dismissing the case instead of striking the petition.

In *Salazar*, the court concluded that because Congress specifically intended to exclude some people from the bankruptcy process, then it was "implausible" to believe that Congress intended that these "same people" should get the benefit of bankruptcy's most powerful protection, the automatic stay.[3] In that case, after analyzing chapter 9 law, the court also changed the terminology from "striking" the petition to "dismissing" the petition. But the court ruled that the effects were the same.

> To the extent that dismissing a petition strikes the petition, the two actions are identical. Both terms evidence an intent to rule that the petition filed never commenced a bankruptcy case....
>
> ... Nonetheless, whether a petition is "dismissed" or "stricken" for failure to comply with § 109(h) carries the same consequences regardless of semantics. A *case* "dismissed" under a provision such as § 707 brings a different result than a *petition* "dismissed" under § 109. *See, In re Rios*, 336 B.R. 177, 180 (Bankr.S.D.N.Y.2005). Dismissal of a petition amounts to dismissal of a "case" prior to the case's commencement....
>
> Understandably, courts have not always chosen their wording in this context with precision. Prior to BAPCPA's enactment, the question of whether to dismiss a case or strike a petition was a difference without a distinction [sic]. It rarely mattered whether an individual's petition in his last case had been "strick-

3. *"It is implausible to believe that Congress specifically identified people to exclude from the bankruptcy process, yet permitted those same people to benefit from bankruptcy's most powerful protection: the automatic stay." Salazar*, 339 B.R. at 624.

en" thereby rendering the current case his first (or second, and so on), or whether it was "dismissed" thereby rendering his current case the second (or third, and so on).

339 B.R. at 633.

Salazar cites no authority other than *Rios* (another bankruptcy case dealing with the credit counseling requirement) for the propositions (i) that the court has authority to "strike" a petition because a debtor was not "eligible", (ii) that dismissal of a case under § 109 is different from dismissal of a case under § 707, (iii) that the filing of a bankruptcy case by an ineligible debtor is a juridical nullity, (iv) that pre-BAPCPA the difference between dismissing a case and "striking" the petition was a distinction without a difference, or (v) that dismissing a chapter 7 or 13 petition is different from dismissing a chapter 7 or 13 case. As discussed below, the substance of those contentions is incorrect. This Court cannot agree with the analysis in *Salazar*.

The fundamental premise of *Salazar* is that if Congress has excluded people from the bankruptcy process, then it is implausible to believe that Congress intended "those same people to benefit from bankruptcy's most powerful protection: the automatic stay." This Court has several issues with that statement. First, while the automatic stay is quite powerful, it is arguable whether the automatic stay is bankruptcy's most powerful protection. The automatic stay is temporary; it creates a temporary respite during reorganization or liquidation, shielding the trustee (and through the trustee shielding other creditors) and shielding the debtor from the chaos of individual creditor executions. The automatic stay terminates when the court so orders,[4] when discharge is entered, or when property ceases to be included in the bankruptcy estate.[5] This Court would argue that that temporary stay is not the most powerful protection of the Bankruptcy Code. Rather, this Court would argue that the provisions of the Bankruptcy Code providing that some property is exempt from creditors' claims,[6] Bankruptcy Code provisions authorizing the debtor to avoid liens,[7] the discharge injunction,[8] and other provisions of the Bankruptcy Code that have permanent consequences are more powerful. But regardless of the power comparisons, *Salazar* is based squarely on the premise that debtors whom Congress has declared to be ineligible should not be able to benefit from the Bankruptcy Code. But in its very next opinion on this subject, the *Hubbard/Salazar* court concludes that local procedural deadlines can trump the Congressional policy concerning ineligibility allowing ineligible debtors to obtain (probably) permanent bankruptcy relief. If it is implausible to believe that Congress did not intend temporary relief to be available to ineligible debtors, it is even more implausible to believe that Congress intended permanent relief to be available to ineligible debtors.

c. Relief for the ineligible . . . nullity overcome by a default order—In re Allison

In *In re Allison*, 2006 WL 2620480 (Bankr.S.D.Tex.2006), the *Hubbard/Salazar* opinions confront one ambiguity and one of the many problems that the Nullity Jurisprudence makes inevitable.

4. Bankruptcy Code § 362(d).

5. Bankruptcy Code § 362(c).

6. Bankruptcy Code § 522.

7. *Id.*

8. Bankruptcy Code § 524.

In *Allison*, debtors were ineligible to file their bankruptcy petition under chapter 13 because their debt limits exceeded the statutory limit of § 109(e). Therefore, under the *Hubbard/Salazar* reasoning, debtors' chapter 13 petition was a nullity; the petition was not sufficient to commence the case. The applicable statutory language defining "petition", determining "commencement of case", and defining "debtor eligibility" for chapter 13 (§ 109(e)) is identical with the correlative language in § 109(h) which is involved in *Hubbard/Salazar* and all of the Nullity Jurisprudence.

The creditor who moved for dismissal of the *Allison* case cited *Hubbard/Salazar* for the proposition that eligibility was jurisdictional. If *Hubbard/Salazar* are correct, then no case is commenced by the filing of a petition by an ineligible debtor. Federal jurisdiction exists only if a bankruptcy case exists.[9] Under *Hubbard/Salazar* ineligibility to file a petition precludes commencement of a case. If there is no bankruptcy case, there is no federal jurisdiction. One cannot say that eligibility to be a debtor is critical to commencement of a case but nevertheless maintain that eligibility to be a debtor is not jurisdictional. Under *Hubbard/Salazar*, the *Allison* petition was a nullity.

Allison purports to reconcile *Hubbard/Salazar* with the Fifth Circuit opinion in *Promenade Nat'l Bank v. Phillips (In re Phillips)*, 844 F.2d 230 (5th Cir.1988) which had held that eligibility to be a debtor was just that, eligibility for bankruptcy relief, *not* jurisdictional. Notwithstanding the statements in *Allison* to the contrary, those cases are not compatible. If a case has not been commenced, there is no case, and if there is no bankruptcy case, there is no federal jurisdiction.[10]

But *Allison* denied the motion to dismiss. The best defense of the *Allison* result is not that *Hubbard/Salazar* do not conflict with *Phillips*, but that *Allison* holds that the creditor who brought the motion is precluded from raising that issue. The creditor's motion to dismiss was filed after the Court had confirmed the debtors' chapter 13 plan. The chapter 13 plan had been confirmed by default order issued prior to the scheduled hearing because no objection to plan confirmation had been timely filed under local rules. *Allison* holds that jurisdiction was adjudicated in the order confirming the debtors' chapter 13 plan, that the confirmation order was final, and that issue of subject matter jurisdiction became *res judicata*. This conclusion is necessary to effect the Nullity Jurisprudence since any other result would mean that debtors could make chapter 13 plan payments for as long as five years, only to find out shortly before their discharge that the bankruptcy court had no jurisdiction and the entire proceeding took place without juridical authority.

As necessary as the result is (if the Nullity Jurisprudence prevails), *Allison's* analysis leaves substantial issues undecided. It is reasonable to question whether it is appropriate to adjudicate the issue of eligibility, and thus the issue of jurisdiction over subject matter, in a default order, issued without hearing, in which the eligibility issues were not actually raised or considered. More significant, while confirmation orders concerning chapter 11 plans are clearly final orders, this Court would not consider that orders confirming chapter 13 plans are necessarily "final orders" in the same context, since a modified plan can be filed at any time, by any number of

9. 28 USC § 1334.

10. *Id.*

parties, and for a number of reasons.[11] Would jurisdiction again be open for decision if a modified plan were filed?[12] Another question is what orders, other than chapter 13 confirmation orders, are final orders precluding subsequent litigation of what *Hubbard/Salazar* establish as issues determining subject matter jurisdiction. For example, would an order appointing a chapter 7 trustee adjudicate eligibility to file a petition and commencement of a case? What about an emergency order for sale of perishable property?[13]

d. The Nullity Jurisprudence creates unnecessary and harmful uncertainty

Most of the Nullity Jurisprudence seems to be concerned about avoiding harsh results of BAPCPA amendments. The Nullity Jurisprudence would eliminate this burden by "striking" the first petition or "dismissing" the first petition to obliterate any effects of the first filing. *Hubbard* is principled, not strictly results-oriented; the *Hubbard/Salazar* result derives from an exceptionally strict interpretation of the Code, and *Salazar* tries to improve the statutory analysis by focusing on what it concludes was the Congressional objective.

But the objective of reducing the burden on unfortunate debtors requires infinite patches and fixes during the course of the case. *Allison* was filed January 2, 2006; the court confirmed the chapter 13 plan on May 22, 2006. For five months, the case was in a twilight zone of ambiguity and uncertainty. Did the court have subject matter jurisdiction or was the case a nullity? To prevent this zone from continuing for as long as five years, the *Allison* court found it necessary to rule that a chapter 13 confirmation order precluded subsequent adjudication of subject matter jurisdiction. A case that was a "nullity" for almost 5 months, filed by a petitioner whom "Congress specifically identified ... to exclude from the bankruptcy process"[14] nevertheless became an unassailable case in which the debtor was entitled to permanent bankruptcy relief. And all this happened by default judgment without hearing or explicit court consideration. To protect all parties during the zone of ambiguity, the *Allison* decision suggests that the Court enter interim orders to establish a stay, to protect the debtor, to protect creditors, *etc.* With thousands of pending cases, and an infinite number of uncertain issues, this solution is fraught with difficulty. But it illustrates the number of patches and fixes that the Nullity Jurisprudence requires. While the *Allison* result is workable, it is unnecessary difficult, expensive (resource intensive), and fragile. The same results obtain, much more simply, if one concludes

11. Bankruptcy Code § 1329.

12. Bankruptcy Code § 1329 requires reconsideration of all § 1325 confirmation issues apply to the modification hearing. Therefore, if eligibility was a requisite determination to plan confirmation, it must be reconsidered upon modification.

13. *Allison*, citing *Kontrick v. Ryan, 540 U.S. 443, 455 n. 9, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004)*, recognizes that the application of *res judicata* requires a "final" order. Bankruptcy cases involve literally thousands of orders in contested matters. There is no one, clear, easily applicable rule for which of them constitutes a "final" order. Even more elusive is the *Allison* test that the determination of jurisdiction is final only "once a court makes a determination that it has jurisdiction and renders a *final decision*." 2006 WL 2620480, at *9 (emphasis added). This Court has no idea what a "final decision" in a chapter 13 bankruptcy case is, unless it is the discharge order. An initial confirmation order could not be a "final decision" since all § 1325 confirmation factors must be reconsidered if a motion is filed to modify the plan.

14. *Salazar*, 339 B.R. at 624.

that ineligibility results in dismissal, not nullity. Or, if the motion to dismiss is brought too late, laches or estoppel is a much more flexible adjudication than *res judicata*.

The Nullity Jurisprudence uses major, invasive neurosurgery to solve a perceived problem that could be resolved with an aspirin. Debtors are entitled to file second (and even third cases) if their first case is dismissed because they neglected to conclude credit counseling prior to filing their bankruptcy petition. Their additional burden is (i) to pay a second filing fee, (ii) to file a motion to extend the § 362 stay beyond 30 days, and (iii) to prove that the second filing was in good faith. Creditor rights and recognition of Congressional objectives to deny benefits to ineligible debtors is equally simple. If one interprets § 109 as *Phillips* instructs (*i.e.* that eligibility is not critical to commencement of a case but is grounds for dismissal), a bankruptcy court has explicit statutory power to effect Congressional objectives to deny ineligible debtors the benefit of the § 362 stay. One does not need to attack jurisdiction over the subject matter to accomplish that Congressional objective. The bankruptcy court has explicit statutory authority to protect creditors from abuse, either in a first case or in any subsequent case; § 362(d) authorizes the court to annul the stay retroactively if appropriate, which is the same result that *Salazar* reaches whether or not the remedy is appropriate.

2. The Eligibility Jurisprudence—the majority rule

The majority of courts addressing this issue have concluded that when the Debtor is not eligible to file a bankruptcy petition the Court should dismiss the case, not "strike the petition". *See, In re Westover*, 2006 WL 1982751 (Bankr.D.Vt.2006); *In re Tomco*, 339 B.R. 145 (Bankr.W.D.Pa. 2006); *In re Racette*, 343 B.R. 200 (Bankr. E.D.Wis.2006); *In re Mills*, 341 B.R. 106 (Bankr.D.D.C.2006); *In re Brown*, 342 B.R. 248 (Bankr.D.Md.2006); *In re Seaman*, 340 B.R. 698 (Bankr.E.D.N.Y.2006) (listing a large number of additional cases).

a. Pre–BAPCPA jurisprudence

There is persuasive (perhaps controlling) pre-BAPCPA jurisprudence that recognizes that a case is commenced even if the petition was filed by an ineligible debtor.

Although credit counseling, as a condition of eligibility for bankruptcy relief, became law in 2005 as part of BAPCPA, debtor eligibility requirements of § 109 are not new to the Bankruptcy Code. Since its enactment in 1978, § 109 of the Bankruptcy Code has set eligibility requirements for chapter 7, chapter 9, chapter 11, and chapter 13.[15] Amendments to the statute have added requirements for chapter 12 and have declared that individuals are not eligible to be debtors under any chapter if those individuals were debtors in cases that were dismissed within the 180 days previous to their most recent filing and if those prior cases were dismissed under certain circumstances.[16] The relevant statutory language for credit counseling eligibility is exactly the same, and is even written in the same section of the Bankruptcy Code.

There is extensive jurisprudence holding even though a petition was filed by a person declared ineligible under § 109, the filing of the petition commenced a case that existed until it was dismissed; the

15. Bankruptcy Code § 109(b), (c), (d), and (e).

16. Bankruptcy Code § 109(f) and (g).

Court had jurisdiction under 28 USC § 1334(a) and (b) because a case existed; the case was not void *ab initio* or a nullity. There is no reason to conclude that language in § 109(h) is to be read any differently from identical language in § 109(a),(b),(c),(d),(e) and (g). *In re Seaman*, 340 B.R. 698 (Bankr.E.D.N.Y.2006) explains the analysis:

> Section 109 of the Bankruptcy Code, captioned "Who may be a debtor," sets forth eligibility criteria for various types of bankruptcy filings. For example, Section 109(e) addresses who may be a debtor under Chapter 13, and provides that a debtor under this Chapter must have "regular income" and unsecured and secured debts that do not exceed prescribed limits. Courts have, with apparent unanimity, concluded that when a Chapter 13 petitioner is ineligible under Section 109(e), the case should be either voluntarily converted or dismissed. *See, e.g., In re Mazzeo*, 131 F.3d 295 (2d Cir.1997) (affirming dismissal of case where debtor's unsecured debt exceeded the Section 109(e) limit). *See also, Dillon v. Texas Comm'n on Envtl. Quality*, 138 Fed.Appx. 609, 612 (5th Cir.2005) (dismissal of case was proper where debtor was ineligible); *In re Ross*, 338 B.R. 134, 136–37 and n. 2 (Bankr. N.D.Ga.2006) ("Almost all courts now recognize that the filing of a chapter 13 petition by a debtor ineligible to do so under § 109(e) nevertheless commences a case that invokes the jurisdiction of the bankruptcy court"); *In re Rifkin*, 124 B.R. 626, 629 (Bankr.E.D.N.Y.1991) ("Whether the debtor is eligible to proceed under Chapter 13 is in essence a motion to dismiss.").
>
> Courts have similarly dismissed, not stricken, bankruptcy cases filed by petitioners who are ineligible for bankruptcy relief by virtue of their corporate or entity status. *See, e.g., In re C–TC 9th Avenue P'ship*, 113 F.3d 1304 (2d Cir. 1997) (dismissing bankruptcy case of partnership in dissolution that was ineligible to be a Chapter 11 debtor under 11 U.S.C. § 109(d)); *In re Westville Distribution and Transp.*, 293 B.R. 101 (Bankr.D.Conn.2003) (dismissing bankruptcy case under 11 U.S.C. §§ 109(a), (b), and (d) where entity on whose behalf a petition was filed had no legal corporate existence).
>
> Courts also have dismissed, rather than stricken, bankruptcy cases filed by petitioners who are ineligible under Section 109(g) of the Bankruptcy Code. Section 109(g) provides that an individual is ineligible to be a debtor if he or she has failed willfully to abide by an order of the court, or has requested and obtained the voluntary dismissal of a case after the filing of a motion for relief from the automatic stay. 11 U.S.C. §§ 109(g)(1), 109(g)(2).

Seaman, 340 B.R. at 701–02.

Prior to BAPCPA the Court of Appeals for the Fifth Circuit very clearly articulated that rule.

> The Bank had argued that eligibility under § 109(g) raised an issue of subject matter jurisdiction. We disagree....
>
> ....
>
> "In a sense, every decision by a court to grant or withhold relief involves 'jurisdiction'-its exercise not its lack. Cases can be dismissed, and relief withheld, for reasons other than lack of subject-matter jurisdiction. 11 U.S.C. § 109 collects several such reasons, whose non-jurisdictional character may be indicated by examples."
>
> As stated by the court in *In re Johnson, supra*, 13 B.R. [342] at 346 [(Bankr. D.Minn.1981)], subject matter jurisdiction of the bankruptcy court comes from 28 U.S.C. § 1471 [now § 1334] and 28

U.S.C. § 157, which provide that the bankruptcy courts shall have exclusive jurisdiction of all cases arising under Title 11. On the other hand, issues pertaining to whether a debtor meets the requirements of § 109(g)(2) only "determine whether or not the court must dismiss the case. They are factual or legal questions which the court must determine. They are the issues raised by the pleadings. They are defenses not jurisdictional requirements." *Id.*...

....

To hold that the issue of debtor eligibility implicates subject matter jurisdiction would have far-reaching consequences. If eligibility raised an issue of subject matter jurisdiction, the parties could not expressly waive, or be held to have waived, their objections on the issue. *E.g., Sosna v. Iowa*, 419 U.S. 393, 398[, 95 S.Ct. 553, 42 L.Ed.2d 532] (1975); *Mitchell v. Maurer*, 293 U.S. 237, 244[, 55 S.Ct. 162, 79 L.Ed. 338] (1934). More important, the issue may, and indeed must, be raised on appeal, even on the court's own motion. *Sumner v. Mata*, 449 U.S. 539, 547 n. 2[, 101 S.Ct. 764, 66 L.Ed.2d 722] (1981). *See also* Fed.R.Civ.P. 12(h)(3).

In short, a closer analysis of the question indicates that eligibility does not raise an issue of subject matter jurisdiction.

Matter of Phillips, 844 F.2d 230, 236 n. 2 (5th Cir.1988) (citation omitted).

b. This Court adopts the reasoning in Seaman. Judge Stong got it right.

The Court finds the analysis in *In re Seaman* to be excellent and persuasive. Since this Court cannot improve that analysis, this Court adopts Judge Stong's opinion with this summary of her conclusions and with mention of the following supplementary points.

[5] An individual's eligibility to be a debtor under § 109 is not jurisdictional. This conclusion comports with fundamental notions of due process. In addition, as Judge Stong notes, this conclusion avoids a number of nightmares, including: (i) perpetual litigation concerning the existence and willfulness of an automatic stay violation, (ii) the validity of an action taken by a creditor against property that might be property of the estate if it is later determined that the debtor was eligible to file a petition, (iii) the prospect of unnecessary inaction by a cautious creditor where a petitioner proves to be ineligible, (iv) new burdens and uncertainties for case administration such as whether filing fees must be returned to ineligible petitioners and whether Chapter 7 trustees may be compensated for work on cases that prove to be a nullity or void *ab initio*.

To those issues raised by Judge Stong, this opinion would add the following examples and concerns. Suppose that a chapter 7 trustee dutifully takes possession of property of the estate, sells perishable property on an emergency basis, and the bankruptcy court later rules that the case is void *ab initio*. Is the trustee liable for wrongfully taking possession of the property? Does the trustee's usual immunity for actions taken in good faith apply? Do sales of property that might occur prior to the ruling on eligibility transfer good title? Is an entity in possession of property of the (putative) estate, or a custodian, required to turn over that property to the trustee? [17] If so, what are the consequences of that turnover with regard to (i) liability of the custodian and trustee, (ii) the effect of possessory liens, *etc.* Bank-

17. Bankruptcy Code § 542, 543.

ruptcy Code § 349 addresses these issues for dismissal, but not for "striking" a petition or "dismissing" a petition on the basis that a case was never commenced.

While "striking" a petition or "dismissing" a petition may comport with Congressional objectives to deny bankruptcy protection in the *first* case to a debtor who did not take credit counseling, that solution contravenes Congressional purpose in because it exempts the debtor from the requirement of making a special showing of good faith when filing a second petition. And if it is implausible that Congress intended ineligible debtors to get the benefit of a temporary § 362 stay, how implausible is it that Congress would have intended that the same debtors get the benefit of a bankruptcy discharge if they are able to confirm a chapter 13 plan by default?

Finally, as Judge Stong noted, and as the Fifth Circuit noted in *Phillips*, retroactive dismissal of cases puts into question the Court's jurisdiction and authority during the period between the filing of the petition and the date that the Court "strikes" the petition. As illustrated by *Allison*, the Nullity Jurisprudence does not deny an ineligible debtor the most powerful benefits of the Bankruptcy Code if the debtor can obtain a default plan confirmation order prior to a hearing on a motion to dismiss, but it is difficult to determine when and how the issue becomes *res judicata* because the Courts will have to decide, on a case by case basis, which bankruptcy court orders determine eligibility and which ones do not. As this opinion noted, substantial questions arise with respect to the authority and liability of a chapter 7 trustee who does his or her duty quickly and effectively. There are substantial questions about protecting third parties such as purchasers of what was purportedly property of the estate.

3. Is there authority for these semantic differences, are these complex analyses necessary, and do they create greater problems than they solve?

The decisions that have considered this issue to date, both the Nullity Jurisprudence and the Eligibility Jurisprudence, seem to assume, without citation of clear authority, that the Court has "alternatives" of dismissing the petition, striking the petition, or dismissing the case. The Court cannot find statutory support for this assumption that these are alternatives. Sections 348, 349, and 350 establish the consequences of conversion, dismissal, and closing a case. The only section that deals with dismissal of a petition is in chapter 9, which the Court finds to be inapplicable for a number of reasons.[18]

Allison notes that rule 9011 of the Federal Rules of Bankruptcy Procedure refers to striking a petition. It allows a petition to be stricken if it is not signed and if that omission is not corrected promptly after the party is notified. There is no provision in the rule for striking a petition because the debtor was not eligible to file the petition. And there is no indication in the rule that striking the petition has any effect other than dismissal of the case.

Once having assumed that the Court has the option of dismissing or striking the petition, the Nullity Jurisprudence then further assumes that if one strikes or dismisses the petition the effect is to erase all effects of having filed the petition. Dismissal of a petition or striking a petition represents "an intent to rule that the petition filed never commenced a bankruptcy case." [19] "Dismissal of a petition amounts

18. Chapter 9 is inapplicable to chapter 7, 11, 12, and 13 cases, *see* Bankruptcy Code § 103.

19. *Rios*, 336 B.R. at 180.

to dismissal of a 'case' prior to the case's commencement."[20] Frankly, this Court does not understand how a judge can dismiss a case prior to the commencement of the case.

US Trustees have filed motions to dismiss under § 109(h) even though debtors materially complied with the statutory requirements, even though debtors had in good faith tried to fulfill Congressional objectives concerning credit counseling, and even though there was no good purpose to serve by filing a motion to dismiss. Perhaps the U.S. Trustees were reluctant to exercise the same prosecutorial discretion that U.S. Attorneys have always exercised because the Nullity Jurisprudence imposes such drastic consequences if the debtor is eventually found to be not eligible: *i.e.* striking the petitions, holding that "no case is commenced", and holding that the petition is void *ab initio*. If there is a possibility of such a drastic result, the U.S. Trustees are well advised to address the question early on, in every case, to protect innocent third parties such as trustees and good faith purchasers. Perhaps the U.S. Trustees would be more inclined to exercise prosecutorial discretion if it were clear that eligibility is not jurisdictional, as the Fifth Circuit has indicated in *Phillips* with respect to other § 109 issues, and if the consequences of not bringing the motion to dismiss were not so vague and potentially serious.

C. Recognition of split in decisions in this district; the need for Circuit consideration

As set out in the introductory paragraph, it is with sincere regret that this Court cannot adopt the reasoning of my esteemed colleague who wrote *Hubbard, Salazar, and Allison*. Judge Isgur and I have discussed, at length, the analysis in his opinions and the analysis in this opinion. I respect that the logic and the commitment of those decisions tries to interpret the statutes as Judge Isgur sees them.

I do not disagree with his conclusion that the statutory language can be read in the way that he reads it. I simply disagree that it *should* be read that way. Applying rigorous logic devoid of statutory and jurisprudential context, it is correct to say that a petition filed by an ineligible person is not a "petition" and that a "petition" filed by an ineligible person does not "commence" a case. And if there is no case, there is no federal jurisdiction.

But Judge Isgur's reading of the statute is not the only possible interpretation. Section 302 states that a case "is commenced" by the filing of a "petition". At least one court has held that "the language of section 301 has an expansive connotation and means 'might' or is meant to express a 'possibility.' "[21]

And then there is the principle that identical statutory provisions must be construed *in pari materia*. *Phillips* and the myriad cases cited by Judge Stong were issued and published long before Congress enacted § 109(h). Those cases clearly held that § 109 limitations were not jurisdictional, that a petition filed by an ineligible petitioner is not null but has juridical effect, that a petition filed by an ineligible petitioner nevertheless creates a case over which federal courts have jurisdiction, and that the case so created can be dismissed or converted. The reasoning of those cases was that if Congress had intended to make eligibility a jurisdictional issue, then Congress would have put eligibility re-

20. *Salazar*, 339 B.R. at 633.

21. *In re Westover*, 2006 WL 1982751 (Bankr. Vt.2006).

quirements in 28 USC § 1334, not in § 109 of the Bankruptcy Code. After that jurisprudence was clearly established, Congress enacted the credit counseling requirements as an eligibility requirement of § 109, in precisely the same language as the eligibility requirements that had previously been interpreted by the courts. Presumably, one should interpret the new, identical language, in the same section of a statute, in the same way that its correlative language has been interpreted for almost 20 years.

Judge Isgur and I both believe that the statute can be interpreted either way. We differ on what we think is the correct interpretation. We both believe that appellate guidance is imperative, and we would suggest direct appeal to the Circuit to resolve the issue for a number of districts instead of for a single district. The majority of this opinion has been dedicated to exploring the points of disagreement with *Hubbard/Salazar/Allison* to try to assure that those differences are clear to the appellate court. If the parties request, I will certify the matter for direct appeal.

CONCLUSION

Debtors are ineligible to be debtors in this bankruptcy case because they did not satisfy the requirements of Bankruptcy Code § 109(h). The filing of the petition is not a nullity. The filing of the petition gave rise to a bankruptcy case which, upon motion by the U.S. Trustee, the Court is obliged to dismiss regardless of the fact that Debtors "almost" met the requirements of the statute, regardless of the fact that Debtors seem to have satisfied Congressional objectives that were enacted as part of the statute, regardless of the fact that no one contends that Debtors were not in good faith, regardless of the fact that no one contends that they did not make a zealous effort to accomplish the Congressional objective, and regardless of the fact that no useful purpose will apparently be served by dismissal.

Therefore, by separate order issued this date, this case is dismissed.

In re James J. HUNT and Kelly L. Hunt, Debtors.

Home Acres Building Supply Co., Plaintiff,

v.

James J. Hunt and Kelly L. Hunt, Defendants.

Bankruptcy No. SG 05–18087. Adversary No. 06–80095.

United States Bankruptcy Court, W.D. Michigan.

Oct. 31, 2006.

Background: Raw materials supplier for business that constructed modular housing and other structures at its manufacturing plant brought adversary proceeding to except debt from discharge in Chapter 7 case filed by business' principals, as debt for debtors' fraud or defalcation while acting in "fiduciary capacity."

Holding: The Bankruptcy Court, Jo Ann C. Stevenson, Chief Judge, held that business that used raw materials provided by its supplier to construct modular structures at its manufacturing plant, which it then sold to dealer that, acting by itself or through its builder, affixed these modular units to property at construction sites, was not itself a "contractor," such as might have trust obligations to its raw materials

[8] Debtors also argue that the case should not be dismissed with prejudice because the second and third factors are not met. All four factors do not need to be satisfied, however. The Ninth Circuit was clear that the test for determining the existence of bad faith is a *totality of the circumstances* test. Further, not all of the factors were satisfied in the cases cited as examples by the Ninth Circuit in *Leavitt*.

Debtors argue that the Debtors' acts were not as egregious as those of the debtor in *Leavitt*. There are in fact a number of similarities between case and *Leavitt*. In both cases, the debtors failed to fully disclose assets and financial dealings; undervalued some assets; omitted their largest creditors; and failed to disclose the receipt of a significant sum of money and the purchase or, here, the remodeling of a home during the case. Nevertheless, the Ninth Circuit noted in *Leavitt* that less offensive conduct had constituted sufficient grounds for dismissal with prejudice. In the Court's view, this case lies somewhere between *Leavitt* and the cases cited therein.

CONCLUSION

For the above reasons, the Court believes that the totality of the circumstances demonstrate that the Debtors have acted in bad faith. Consequently, Debtors case may and should be dismissed with prejudice. The motion of the Trustee and Cedar is granted.

Counsel for Trustee is directed to submit a proposed form of order in accordance with this decision.

In re Javier ROMERO, and Ana T. Romero, Debtors.

No. 06–30568 TEC 7.

United States Bankruptcy Court, N.D. California.

Sept. 8, 2006.

Background: Would-be Chapter 7 debtors applied for temporary waiver of credit counseling requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) on eligibility for bankruptcy relief, and the United States Trustee (UST) objected and moved to dismiss case on ground that debtors had not demonstrated the requisite "exigent circumstances."

Holding: The Bankruptcy Court, Thomas E. Carlson, J., held that would-be Chapter 7 debtors who, three days before filing for bankruptcy relief, had requested credit counseling from approved agency but been unable to obtain it within requisite five-day period specified by statute, and who had need to file for bankruptcy in order to prevent garnishment of debtor-husband's wages, sufficiently established requisite "exigent circumstances" and were entitled to temporary waiver of credit counseling requirement.

Motion denied.

1. **Bankruptcy** ⇐2222.1

Threat of serious creditor action before credit counseling can be obtained generally is sufficient to establish "exigent circumstances," of kind required for temporary waiver of credit counseling requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) on eligibility for bankruptcy relief. 11 U.S.C.A. § 109(h)(3)(A).

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy ⇐2222.1

"Serious creditor action," a threat of which before credit counseling can be obtained may be sufficient to warrant temporary waiver, on "exigent circumstances" theory, of credit counseling requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) on eligibility for bankruptcy relief, can include foreclosure, eviction, wage garnishment, or repossession of automobile. 11 U.S.C.A. § 109(h)(3)(A).

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy ⇐2222.1

Advance knowledge of threatened creditor action should not preclude a finding of "exigent circumstances," of kind required for temporary waiver of credit counseling requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) on eligibility for bankruptcy relief. 11 U.S.C.A. § 109(h)(3)(A).

4. Bankruptcy ⇐2222.1

"Exigent circumstances" required under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) for a temporary waiver of prepetition credit counseling requirement should not be read to impose a significant financial loss upon debtor, simply because debtor did not anticipate that she or he might not be able to get credit counseling within five days of requesting it. 11 U.S.C.A. § 109(h)(3)(A).

5. Bankruptcy ⇐2222.1

Would-be Chapter 7 debtors who, three days before filing for bankruptcy relief, had requested credit counseling from approved agency but been unable to obtain it within requisite five-day period specified by statute, and who had need to file for bankruptcy in order to prevent garnishment of debtor-husband's wages, sufficiently established requisite "exigent circumstances" and were entitled to temporary waiver of credit counseling requirement, despite United States Trustee's (UST's) contention that they had sufficient advance knowledge of wage garnishment to have requested credit counseling at earlier date. 11 U.S.C.A. § 109(h)(3)(A).

Donald E. Bloom, Law Offices of Donald E. Bloom, San Francisco, CA, for Debtors.

OPINION

THOMAS E. CARLSON, Bankruptcy Judge.

This case turns upon what constitutes "exigent circumstances" permitting a debtor to file for bankruptcy relief before obtaining credit counseling. I determine that such circumstances generally exist where the debtor faces serious and immediate creditor action before the debtor can obtain credit counseling. The wage garnishment faced by Debtors in this case qualifies under this standard.

FACTS

Ana and Javier Romero ("Debtors") filed a chapter 7 bankruptcy petition on July 10, 2006. Concurrently with their petition, Debtors filed a request for a temporary waiver of the prepetition credit counseling requirement (the "Certification"). The Certification states under penalty of perjury that Javier was the sole wage earner for the family, and that he faced imminent garnishment of his wages. Debtors certified that they needed to file bankruptcy immediately, prior to the wage garnishment taking effect, and that they tried to get credit counseling before filing their bankruptcy petition but were unable to do so.

On July 13, 2006, the court filed an Order Re Debtors' 109(h) Exigent Circumstances Declaration (the "Order"). The Order gave Debtors until August 9, 2006 to file a sworn declaration as to whether Debtors requested prepetition credit counseling services from an approved agency but were unable to obtain such services during the five-day period beginning on the date of their request.

On July 14, 2006, Debtors obtained credit counseling from Money Management International Inc. ("Money Management"), an agency approved to provide such counseling in this district. On July 17, 2006, the United States Trustee filed her Motion to Dismiss Under Section 109(h). On the same day, Debtors filed proof of having completed the credit counseling.

On July 24, 2006, Debtors filed an additional sworn declaration (the "Supplemental Certification") regarding their prepetition efforts to obtain credit counseling. The Supplemental Certification states that on July 7, 2006, three days prior to the petition date, Debtors telephoned Money Management to obtain the required prepetition counseling services, but that Debtors were unable to obtain the required counseling until July 14, seven days after their request.

At the hearing on the Motion to Dismiss, the United States Trustee argued that the Supplemental Certification did not state exigent circumstances because Debtors would have had adequate prior notice of the wage garnishment.

DISCUSSION

Bankruptcy Code section 109(h)(1) conditions an individual debtor's eligibility for bankruptcy relief on obtaining credit counseling from an approved agency before filing. If a debtor files a bankruptcy petition without obtaining such counseling, the case must be dismissed unless the debtor obtains a temporary or permanent waiver of the credit counseling requirement. *See* 11 U.S.C. § 109(h). To obtain a temporary waiver, the debtor must submit to the court a certification that satisfies the following conditions: (1) it must describe "exigent circumstances" meriting a short-term exemption; (2) it must state that the debtor requested credit counseling services from an approved agency, but was unable to obtain the services during the five-day period beginning on the date the debtor made the request; and (3) it must be satisfactory to the court. 11 U.S.C. § 109(h)(3)(A). The Bankruptcy Code does not define exigent circumstances, and courts have not agreed upon an interpretation.

One line of cases concludes that the exigent circumstances standard is a high one that is generally not satisfied when the debtor has sufficient advance knowledge of the threatened creditor action to obtain the credit counseling before the creditor action takes effect. *See, e.g., In re DiPinto,* 336 B.R. 693 (Bankr.E.D.Pa.2006) (debtor's imminent loss of home to foreclosure scheduled to occur on petition date not exigent circumstances); *In re Anderson,* 2006 WL 314539, at *2 (Bankr. N.D.Iowa Feb.6, 2006) (existing wage garnishment of husband's income plus wife's recent loss of employment not exigent circumstances); *In re Rodriguez,* 336 B.R. 462, 474–76 (Bankr.D.Idaho 2005) (boilerplate allegations re impending third garnishment insufficient); *In re Valdez,* 335 B.R. 801, 803 (Bankr.S.D.Fla.2005) (filing bankruptcy to prevent foreclosure scheduled two days later not exigent circumstances because foreclosure did not prevent debtor from obtaining counseling).

The other line of cases holds that exigent circumstances exist when the debtor is unable to obtain credit counseling within five days of requesting such counseling, and faces immediate creditor action before

the credit counseling can be obtained. *See, e.g., In re Henderson*, 339 B.R. 34, 39 (Bankr.E.D.N.Y.2006) (impending sale of home or sole means of transportation are examples of potentially exigent circumstances warranting temporary relief) (dictum); *In re Hubbard*, 333 B.R. 377, 384 (Bankr.S.D.Tex.2005) (exigent circumstances exist when debtor faces loss of family home or permanent loss of sole means of transportation unless immediate bankruptcy relief granted); *In re Childs*, 335 B.R. 623, 630–31 (Bankr.D.Md.2005) (imminent sale of property at foreclosure and/or imminent eviction from residence are exigent circumstances).

[1, 2] I find the second line of cases more persuasive, and conclude that the threat of serious creditor action before credit counseling can be obtained generally is sufficient to establish exigent circumstances.[1]

[3, 4] Advance knowledge of the threatened creditor action should not preclude a finding of exigent circumstances. The statutory language chosen does not suggest such a limitation. As noted in the *Childs* decision, requiring the debtor to explain why she or he did not seek credit counseling earlier is more akin to an excusable neglect standard than to an exigent circumstances standard.

> The standard for exigent circumstances set forth in the statute is minimal. It requires only that the debtor state the existence of some looming event that renders prepetition credit counseling to be infeasible. The standard is not one of "excusable neglect" that would require the Court to delve into the reasons why the exigent circumstances occurred.

Childs, supra, 335 B.R. at 630. Nor is such a limitation required by the statutory purpose of credit counseling enunciated by Congress.

> Most importantly, [section 109(h)] requires debtors to participate in credit counseling programs before filing for bankruptcy relief (unless special circumstances do not permit such participation). The legislation's credit counseling provisions are intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy-such as the potentially devastating effect it can have on their credit rating.

H.R.REP. No. 109–31, pt.1, at 18, U.S.Code Cong. & Admin.News 2005, pp. 88, 104 (2005). The Committee Report states that this stop-and-think requirement was intended for the benefit of the debtor. A statute with such a purpose should not be read to impose a significant financial loss on a debtor because that debtor did not anticipate that she or he might not be able to get credit counseling within five days of requesting it.

It must be remembered that exigent circumstances are relevant only if the debtor has been unable to obtain credit counseling within five days of requesting it. The presence of this five-day provision in the statute represents a Congressional determination that a debtor's expectation of obtaining counseling within that period is reasonable.

[5] In this case, Debtors faced imminent garnishment of their only income. The only way to stop the wage garnishment from taking effect was for Debtors to file bankruptcy by July 10. Debtors requested credit counseling from an ap-

1. Serious creditor action could include foreclosure, eviction, wage garnishment, or repossession of an automobile.

proved agency on July 7, but were unable to obtain the requested services until seven days later. I determine that the looming wage garnishment constitutes exigent circumstances permitting a temporary waiver of the credit counseling requirement. Accordingly, the United States Trustee's Motion to Dismiss is denied.

In re QMECT, INC., etc., Debtor-in-Possession.

The Official Creditors' Committee for QMect, Inc., Plaintiff,

v.

Electrochem Funding, LLC and Burlingame Capital Partners II, L.P., Defendants.

Bankruptcy No. 04-41044 T. Adversary No. 04-4189 AT.

United States Bankruptcy Court, N.D. California.

Sept. 21, 2006.

Background: Unsecured creditors' committee moved to amend complaint that it had previously filed to add and delete certain claims, and defendants objected.

Holdings: The Bankruptcy Court, Leslie Tchaikovsky, held that:

(1) deadline specified in cash collateral order for challenging validity, priority, perfection and enforceability of creditors' claims applied only to challenges based on state law, and did not impose time limit on pursuit by estate representative of bankruptcy avoidance claims;

(2) committee could amend its complaint for declaratory relief to assert actual avoidance claims; but

(3) committee would not be permitted to dismiss its claims that lender's loan was usurious, or that lenders had violated one action rule and had thus lost their liens, except with prejudice.

So ordered.

1. Bankruptcy ⇐2162

Court approval is required to amend complaint after answer has been filed. Fed.Rules Bankr.Proc.Rule 7015, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

2. Bankruptcy ⇐2162

While decision of whether to grant a motion to amend complaint is within sound discretion of court, such motions are to be granted freely when justice so requires. Fed.Rules Bankr.Proc.Rule 7015, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

3. Bankruptcy ⇐2162

Grounds for denial of leave of leave to amend pleading include undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by prior amendments, undue prejudice to opposing party, and futility of amendment; in addition, judicial economy may also be considered. Fed.Rules Bankr.Proc.Rule 7015, 11 U.S.C.A.; Fed. Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

4. Bankruptcy ⇐2162

Court may impose reasonable conditions on grant of motion to amend pleading, including requirement that dismissal be with prejudice. Fed.Rules Bankr.Proc. Rule 7015, 11 U.S.C.A.; Fed.Rules Civ. Proc.Rule 15(a), 28 U.S.C.A.

is excepted from discharge under §§ 523(a)(1)(A) and 507(a)(8)(C).

In re David R. BRICKSIN and Vivian M. Bricksin, Debtors.

No. 05-59499-ASW.

United States Bankruptcy Court, N.D. California.

July 26, 2006.

Background: United States Trustee (UST) moved to dismiss Chapter 7 case, based on debtors' alleged noncompliance with credit counseling requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).

Holding: The Bankruptcy Court, Arthur S. Weissbrodt, J., held that, while debtors' initial credit counseling session, occurring more than 180 days prior to petition date, was technically insufficient to satisfy the BAPCPA's credit counseling requirement, debtors' conduct, after they obtain this initial counseling, in participating in and performing under plan developed by counselor for several months until they were eventually forced to file bankruptcy petition, as their counselor had initially recommended, qualified as ongoing "credit counseling," that extended into statutory 180-day period, and that satisfied requirements of the BAPCPA.

Motion denied.

1. **Bankruptcy ⇐2125, 2222.1**

While Chapter 7 debtors' initial credit counseling session, occurring more than 180 days prior to petition date, was technically insufficient to satisfy prepetition credit counseling requirement imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), debtors' conduct, after they obtained this initial counseling, in participating in and performing under plan developed by counselor for several months until they were eventually forced to file bankruptcy petition, as their counselor had initially recommended, qualified as ongoing "credit counseling," that extended into statutory 180-day period, and that satisfied requirements of the BAPCPA; it would be inequitable, after debtors had sought out and obtained credit counseling and used their best efforts to repay debts, rather than immediately filing for bankruptcy, to dismiss case based on length of time that they attempted to perform under plan developed by credit counselor. 11 U.S.C.A. § 109(h).

See publication Words and Phrases for other judicial constructions and definitions.

2. **Bankruptcy ⇐2261**

Statutory list of circumstances that will constitute "cause" for dismissal of Chapter 7 case is illustrative and not exhaustive. 11 U.S.C.A. § 707(a).

3. **Bankruptcy ⇐2222.1**

Intent behind credit counseling requirement of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) is to encourage debtors to seek alternatives to bankruptcy process and to promote debtor awareness of effects of bankruptcy filing by requiring prepetition credit counseling. 11 U.S.C.A. § 109(h).

4. **Bankruptcy ⇐2125**

Bankruptcy court is court of equity.

David R. Bricksin, Los Gatos, CA, pro se.

Vivian M. Bricksin, Los Gatos, CA, pro se.

Mohamed Poonja, Los Altos, CA, for trustee.

MEMORANDUM DECISION ON THE UNITED STATES TRUSTEE'S MOTION TO DISMISS

ARTHUR S. WEISSBRODT, Bankruptcy Judge.

Before the Court is the motion of the United States Trustee ("Trustee") to dismiss the chapter 7 case of David R. Bricksin and Vivian M. Bricksin ("Debtors"). Trustee brought this motion pursuant to 11 U.S.C. §§ 707(a), 109(h) and 521(b) and Interim Rule 1007(b)(3) asserting that Debtors failed to file certificates from an approved credit counseling agency evidencing Debtors' receipt of credit counseling within the 180-day period preceding the date of filing the petition.

This Memorandum Decision constitutes the Court's findings of fact and conclusions of law, pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I.

PROCEDURAL BACKGROUND

Debtors filed a voluntary petition under chapter 7 of the Bankruptcy Code ("Petition") on November 22, 2005. On December 2, 2005, Trustee filed a "Motion by United States Trustee to Dismiss Chapter 7 Case" ("Motion to Dismiss").

On January 9, 2006, Debtors filed "Debtor's Response to United States Trustee's Motion to Dismiss Chapter 7 Case" ("Debtor's Response"), along with the "Declaration of David Bricksin, with Exhibits, in Support of Debtor's Response to United States Trustee's Motion to Dismiss Chapter 7 Case" ("Declaration of David Bricksin"). On February 22, 2006, Trustee filed a "Memorandum of Law in Further Support of the Motion by United States Trustee to Dismiss Chapter 7 Case" ("Trustee's Memorandum of Law"). On March 20, 2006, Debtors filed "Debtor's Supplemental Response to United States Trustee's Motion to Dismiss Chapter 7 Case and Debtors Response to Memorandum of Law in Further Support of the Motion by United States Trustee to Dismiss Chapter 7 Case: Declaration of David Bricksin" ("Debtors' Supplemental Response").

On April 3, 2006, Trustee filed a "Reply to Debtors' Supplemental Response to United States Trustee's Motion to Dismiss Chapter 7 Case" ("Trustee's Reply to Debtor's Supplemental Response") and an accompanying "Declaration of Shannon L. Mounger in Support of Reply to Debtor's Supplemental Response to United States Trustee's Motion to Dismiss Chapter 7 Case" ("Declaration of Mounger").

The matter was fully briefed and argued on May 4, 2006. Debtors appeared *in propria persona*. Trustee was represented by Shannon L. Mounger, Esq. The Court heard testimony from the Debtors at the hearing.

II.

STATEMENT OF FACTS[1]

The facts of this case are undisputed.

Debtors' financial difficulties began when, sometime in 2004[2], David Bricksin

1. The information in this section comes from the Declaration of David Bricksin dated January 8, 2006, the Declaration of Mounger dated April 3, 2006, the Exhibits attached to the declarations, and the testimony received at the hearing.

2. The actual date when Mr. Bricksin lost his job does not appear in the record, but it can

lost a relatively high-paying job. As a result of this unexpected calamity, Debtors were no longer able to afford their then-current lifestyle. Concerned about their mounting debts, David Bricksin contacted Consumer Credit Counseling Services ("CCCS").

Debtors sought the professional assistance of CCCS to evaluate their options. CCCS conducted a counseling session with Debtors. The session was held on or about October 19, 2005.[3] During the course of the counseling provided by CCCS, the Debtors received instruction in financial management and actively participated in a financial management course. They provided all of their financial information to CCCS, including their current income, living expenses, assets and liabilities. CCCS then analyzed the information and provided Debtors with customized recommendations. Based on this information, CCCS advised the Debtors that they did not have sufficient resources to repay their debts and recommended that they file for bankruptcy protection. Debtors were determined, however, to make an effort to repay their creditors without the aid of a bankruptcy filing.

With CCCS's professional expertise, a customized action plan was created, which contained recommendations and options for the Debtors.[4] As a part of this customized plan, CCCS developed a repayment plan for the Debtors which was designed to allow Debtors to reimburse their creditors. The repayment plan called for monthly payments of $2,200.00 toward their debts.

Debtors made regular and significant payments pursuant to the repayment plan until July 2005. The total funds paid to creditors under the repayment plan exceeded $11,000.00. Sometime in July 2005, when the Debtors were running out of money and came to the realization that they could no longer afford to continue with the debt repayment plan, David Bricksin contacted CCCS again in an effort to discuss with CCCS their financial situation. During this conversation, Mr. Bricksin was told that the repayment plan would be discontinued and that Debtors could not contact CCCS regarding credit counseling services for five years. On July 28, 2005, CCCS sent a letter, addressed to David Bricksin, stating that Debtors' financial circumstances no longer allowed them to continue with the repayment plan.[5] The Bricksins, of course, were aware of that fact—they had just told CCCS that they were unable to do so.

Debtors filed for bankruptcy protection on November 22, 2005. As discussed above, before making this decision, Debtors had consulted CCCS, a professional credit counseling agency, considered the effect a bankruptcy filing would have on their lives, rejected CCCS' advice that they file for bankruptcy, developed a debt

be inferred from the circumstances that it occurred sometime in 2004. In any event, the exact date is of no legal consequence.

3. The Trustee points to CCCS's October 19, 2004 Letter to David Bricksin, attached to the Declaration of Mounger as Exhibit A, as evidence that Debtors participated in a credit counseling session on October 19, 2004. See Trustee's Reply to Debtor's Supplemental Response. However, the Declaration of David Bricksin, indicates that the services of CCCS were sought "[e]arly in 2005". The Court finds that the Trustee's account is correct, and that Mr. Bricksin must have been mistaken as to the date of the counseling session.

4. Neither party has provided the Court with a copy of the debt repayment plan prepared by CCCS.

5. A copy of the July 28, 2005 letter is attached to the Declaration of David Bricksin as Exhibit 2.

repayment plan with CCCS, attempted to repay creditors and, in fact, made payments to creditors in excess of $11,000.00. Their decision to seek bankruptcy relief was clearly the result of a well-informed, deliberate process. Debtors were in the process of carrying out the repayment plan (*i.e.*, making substantial monthly payments to their creditors) within the 180–day period prior to filing.

The second page of the Debtors' Petition contains a section entitled "Certification Concerning Debt Counseling by Individual/Joint Debtor(s)". In this section appear two boxes. To the right of the first box is the sentence "I/we have received approved budget and credit counseling during the 180–day period preceding the filing of this petition". Adjacent to the second box is the following statement: "I/we request a waiver of the requirement to obtain budget and credit counseling prior to filing based on exigent circumstances. (Must attach certification describing.)". On the Petition, Debtors checked the first box. At the time the Petition was filed, Debtors did not attach a certificate regarding their receipt of credit counseling to the Petition, nor did they file one separately.

The Trustee filed the instant Motion to Dismiss on December 2, 2005. Attached to the Declaration of David Bricksin accompanying Debtors' Response as Exhibit 4(a) is a certificate which states as follows:

> "I CERTIFY that on 12–22–2005, DAVID R BRICKSIN received from Consumer Credit Counseling Service, an agency approved pursuant to 11 U.S.C. § 111 to provide credit counseling, an individual briefing (including a briefing conducted by telephone or the Internet) that complied with the provisions of 11 U.S.C. §§ 109(h) and 111. A debt repayment plan was not prepared. If a debt repayment plan was prepared, a copy of the debt repayment plan is attached to this certificate."

Exhibit 4(a) is dated December 22, 2005, and is electronically signed by Kathryn Gillespie, Counselor. Also attached to the Declaration as Exhibit 4(b) is another certificate, identical in all respects to Exhibit 4(a), except that it names "VIVIAN BRICKSIN" as the recipient of credit counseling. According to Exhibits 4(a) and 4(b), Debtors again received credit counseling on December 22, 2005—one month after filing the Petition. Thus, Debtors twice paid for and received credit counseling.

The Court held a hearing on the Motion to Dismiss on May 4, 2006. Both Debtors testified at the hearing.

III.

APPLICABLE LAW

[1] Trustee brings its Motion to Dismiss pursuant to 11 U.S.C. §§ 109(h), 521(b), 707(a) and Interim Rule 1007(b)(3).

Congress recently enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). The provisions of the BAPCPA became effective on October 17, 2005.

Section 109(h), which was added to the Code as a part of the BAPCPA, provides, in pertinent part, that "an individual may not be a debtor under this title unless such individual has, during the 180–day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis." 11 U.S.C. § 109(h)(1) (2005).

This Court has adopted the Interim Rules prepared by the Advisory Commit-

tee on Bankruptcy Rules pursuant to General Order No. 16 dated September 23, 2005. Interim Rule 1007(b)(3) states, in relevant part, that "an individual must file the certificate and debt repayment plan, if any, required by § 521(b)." Federal Rules of Bankruptcy Procedure, Interim Rule 1007(b)(3) (2005). Section 521(b), also effective October 17, 2005, requires that the debtor file with the court "(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to debtor; and (2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1)." 11 U.S.C. § 521(b) (2005).

[2] Section 707(a) provides for dismissal of a case for cause. 11 U.S.C. § 707(a) (2005). The section lists a number of examples which constitute "cause", but this list is illustrative and not exhaustive. *In re Padilla*, 222 F.3d 1184, 1191 (9th Cir. 2000). Trustee submits that Debtors failed to obtain credit counseling from an approved agency within the 180–day period prior to filing the Petition and failed to file the certificate required by § 521(b). Trustee argues that these failures constitute cause for dismissal of Debtors' case under § 707(a). Debtors contend that they did comply with the relevant statutory requirements and, accordingly, the Trustee's Motion to Dismiss should be denied.

IV.

ANALYSIS

The Petition was filed on November 22, 2005, and thus all statutory amendments contained in the BAPCPA apply in this case.

Read in tandem, §§ 109(h), 521(b), 707(a) and Interim Rule 1007(b)(3) require the Debtors to receive credit counseling from an approved agency within the 180–day period prior to filing the Petition, and to file a certificate evidencing their receipt of the pre-petition counseling in order to be eligible Debtors under the Bankruptcy Code.

Construed strictly, Debtors have not satisfied the letter of the statutory requirements. Debtors did receive credit counseling, but the date of the initial session was not within the 180–day period prior to filing. While the Debtors checked the box on the Petition to indicate receipt of pre-petition counseling, they did not attach the certificates required by Interim Rule 1007(b)(3).[6]

However, the intent of Congress in enacting these particular provisions of BACPCA is clear. The statutory provisions requiring debtors to receive credit counseling before they can be eligible for bankruptcy relief were enacted so that debtors "will make an informed choice about bankruptcy, its alternatives, and consequences." H.R.Rep. No. 109–031, at 2 (2005), U.S.Code Cong. & Admin.News 2005, pp. 88, 89. As one court has stated, "[t]he statute is clear in that it unequivocally requires that the credit counseling be obtained *prior to* the filing of the petition." *In re Warden*, No. 05–23750, 2005 WL 3207630 (Bankr.W.D.Mo. Nov.22, 2005)(emphasis added). Congress' objective "in enacting the credit counseling re-

6. Debtors did attach certificates which appear to show their receipt of credit counseling to the Declaration of David Bricksin (Exhibits 4(a) and 4(b) referenced in section II(C) above). Both of these certificates are dated December 22, 2005, exactly one month after the Petition date. Thus, these certificates apparently relate to post-petition counseling, and do not fulfill the statutory requirements.

quirement is that focusing on a budget analysis with the help of a credit counseling professional might obviate the need for seeking bankruptcy relief for some debtors." *Id.* The *Warden* court dismissed the debtor's petition for failure to obtain credit counseling pre-petition, finding that the Congressional intent is not upheld by receiving post-petition counseling. *Id.*

[3] The Court finds that application of the statutory scheme to dismiss this case, as the Trustee urges, would produce a result at odds with Congressional intent. The intent behind these statutory amendments is to encourage debtors to seek alternatives to the bankruptcy process and to promote debtor awareness of the effects of a bankruptcy filing by requiring pre-petition credit counseling. Debtors had received extensive pre-petition credit counseling and then—during the 180-day period prior to filing for bankruptcy—were proceeding with their repayment plan, and making very substantial payments to creditors. While failing to comply with the law's technical letter, the Debtors were clearly in compliance with its spirit. The Court finds that the Debtors' need for a bankruptcy filing was not and could not have been obviated by additional credit counseling. Debtors were keenly aware of the implications of the bankruptcy filing. Indeed, CCCS had advised the Debtors that their only viable option was to file for bankruptcy.

While the credit counseling session attended by Debtors was held outside of the 180-day period prescribed by the statute, the Court is persuaded that Debtors' participation in and performance under a debt repayment plan constitutes ongoing credit counseling sufficient to satisfy the statutory requirement on the individual and unusual facts of this case. Debtors performed under the repayment plan until July 2005, less than 180 days before filing the Petition. This performance necessitated that Debtors write a substantial check each month toward the payment of their debts. Debtors were no less aware of their financial predicament in July 2005 than they were at the time their counseling session was held. The Court finds that Debtors' completion of credit counseling, and then ongoing performance under the debt repayment plan within the 180-day period prior to filing, fulfills the spirit of the statutory requirement. This is especially true here, where the credit counselor advised Debtors to file for bankruptcy in the first place. Debtors did not follow that advice and attempted to carry out a repayment plan. Then, after making substantial payments to their creditors, Debtors accepted the reality of their situation and filed for bankruptcy—as CCCS had initially advised them to do.

[4] Counsel for the Trustee pointed out at the hearing that the agency from which Debtors received counseling was not on the approved list of providers at that time. However, that provider was subsequently approved in September 2005, prior to the effective date of the BAPCPA.[7] This situation is perfectly understandable in the context of this brand new legislation. The Bankruptcy Court is a court of equity.

7. Counsel for the Trustee noted that the providers approved by the Trustee were required to go through an application process and that some providers were required to change their procedures to receive approval. However, the Trustee does not suggest that the Debtors in fact were improperly counseled or misled in any way. To the contrary, all of the available evidence suggests that Debtors acted responsibly and made every effort to comply with the spirit of the statutory requirements. Moreover, The Trustee certainly could have advised the Court if CCCS's procedures had to be revamped following BAPCPA. The Trustee presumably would have access to that information and did not introduce any evidence to that effect.

Debtors have already paid for and completed two credit counseling sessions. It would be inequitable for this Court to hold that these Debtors' technical non-compliance with the law, despite their very best efforts, warrants dismissal of this case, which would require these Debtors to start all over, to pay another $299.00 filing fee, and potentially deprive them of the protection of the automatic stay.[8]

V.

CONCLUSION

Despite Debtors' technical non-compliance with the statutory scheme, Debtors clearly complied with the spirit of the rule. In the context of this new statute, this unique set of facts is unlikely to present itself again. Application of the law in this case to dismiss Debtors' petition would contravene Congressional intent. Therefore, the Trustee's Motion to Dismiss is denied.

In re George E. DAWSON, Barbara Dawson, Debtors.

George E. Dawson and Barbara Dawson, Plaintiffs,

v.

Washington Mutual Bank, etc., Defendant.

Bankruptcy No. 98-45213 TG. Adversary No. 98-4796 AT.

United States Bankruptcy Court, N.D. California.

July 27, 2006.

Background: Chapter 13 debtors brought adversary proceeding to recover for allegedly willful violations of the automatic stay by bank, as successor-in-interest to home mortgage lender, in prior Chapter 7 case filed by debtor-husband, who was alive when the proceeding was filed but died during the appellate period. The United States Bankruptcy Court for the Northern District of California found only a limited stay violation, awarded modest damages and attorneys fees, and declined to award emotional distress damages. Debtors appealed. The District Court, Wilken, J., affirmed on issue of emotional distress damages and remanded. Debtors appealed. Superseding its prior opinion, 367 F.3d 1174, the Court of Appeals, Graber, Circuit Judge, 390 F.3d 1139, affirmed in part, reversed in part, and remanded.

Holdings: On remand, the Bankruptcy Court, Leslie Tchaikovsky, J., held that:

(1) debtor-wife, as surviving spouse, was entitled to damages for bank's willful stay violation from the date that bank learned that debtor-husband claimed an interest in the encumbered home until the date more than five months later when bank rescinded its foreclosure sale of the home;

(2) bank was liable to debtor-wife for emotional distress damages of $20,000.00;

(3) bank was liable to debtor-wife for special damages of $600.00 for the services of debtor-husband's bankruptcy counsel;

(4) bank was liable to debtor-wife for special damages of $5,400.00 for rent;

(5) bank was liable to debtor-wife for special damages of $1,440.00 for physical therapy costs;

(6) bank was liable to debtor-wife for attorneys fees of $156,818.75; and

8. Debtors list a secured vehicle debt relating to a 2002 Chevrolet Suburban on their Schedule D which is potentially affected by the automatic stay.

In re Kevin/Adrienne KOLIBA, Debtors.

No. 05-74612.

United States Bankruptcy Court, N.D. Ohio.

Jan. 17, 2006.

Background: United States Trustee (UST) moved to dismiss debtors' Chapter 7 case, based on debtors' noncompliance with protocol governing the electronic filing of petitions with bankruptcy court in failing to sign a petition.

Holdings: The Bankruptcy Court, Richard L. Speer, J., held that:

(1) dismissal of Chapter 7 case was not appropriate remedy for debtors' noncompliance with this protocol; and

(2) lack of debtor's signature on bankruptcy petition, whether filed by paper or electronically, does not deprive bankruptcy court of jurisdiction over case.

Motion denied.

1. **Bankruptcy** ⇐2257

Purpose of requiring debtor's signature on bankruptcy petition is to verify that facts set forth therein are correct.

2. **Bankruptcy** ⇐2261

Dismissal of Chapter 7 case was not appropriate remedy for debtors' noncompliance with a protocol governing the electronic filing of petitions with bankruptcy court, which required debtors to physically sign a bankruptcy petition and for debtors' attorney to maintain copy of this petition in his files for period of one year after any electronic filing on debtors' behalf, where the United States Trustee (UST), in moving to dismiss, did not allege that dismissal would be in best interest of debtors' estate or their creditors and failed to satisfactorily explain how any objective of bankruptcy law would be furthered by dismissal based on debtors' failure to sign their petition.

3. **Bankruptcy** ⇐2125

Bankruptcy courts are courts of equity, in which substance will prevail over form.

4. **Bankruptcy** ⇐2129

Requirement that Bankruptcy Rules must be construed to "secure the just... determination of every case and proceeding" is no less applicable to protocols promulgated by court pursuant to these Rules. Fed.Rules Bankr.Proc.Rule 1003, 11 U.S.C.A.

5. **Bankruptcy** ⇐2261

Chapter 7 case may be dismissed only "for cause." 11 U.S.C.A. § 707(a).

6. **Bankruptcy** ⇐2261

While bankruptcy courts have wide latitude in deciding whether "cause" exists for dismissal of Chapter 7 case, a minimum threshold that this "for cause" dismissal standard envisions is the furtherance of some bankruptcy objective, not simply a debtor or other party's contention that its personal interest would be better served by dismissal. 11 U.S.C.A. § 707(a).

7. **Bankruptcy** ⇐2257

Lack of debtor's signature on bankruptcy petition, whether filed by paper or electronically, does not deprive bankruptcy court of jurisdiction over case.

8. **Bankruptcy** ⇐2129, 2187

Curative provision of Bankruptcy Rule 9011, which specifies that any unsigned paper shall be stricken "unless omission of the signature is corrected promptly after being called to the attention of the attorney or party," is equally applicable to debtors proceeding pro se and debtors represented by attorney. Fed.Rules Bankr.Proc.Rule 9011(a), 11 U.S.C.A.

9. Bankruptcy ⇐2187

Bankruptcy Rule 9011, being derived from Rule 11 of the Federal Rules of Civil Procedure, is to be interpreted consistently therewith. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.; Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

10. Bankruptcy ⇐2261

Procedural violation of Bankruptcy Rule, let alone of an administrative protocol, even one involving document's verification, is not alone a sufficient basis for granting motion to dismiss for lack of jurisdiction. Fed.Rules Bankr.Proc.Rule 1001 et seq., 11 U.S.C.A.

Ericka S Parker, Esq., Toledo, OH, for debtors.

John N. Graham, Toledo, OH, for trustee.

MEMORANDUM OPINION AND DECISION

RICHARD L. SPEER, Bankruptcy Judge.

This cause comes before the Court after a Hearing on the Motion by the United States Trustee to Dismiss pursuant to 28 U.S.C. § 1746. Heard at the same time as this Matter was the United States Trustee's identical Motion to Dismiss in the case of Paul Sielschott, Case No. 05–76147. At the Hearing, all the Parties with an interest in this matter were afforded the opportunity to make arguments in support of their respective positions. At the conclusion of the Hearing, the Court took the Matter under advisement, so as to afford time to give the issues raised by the United States Trustee's Motion thorough consideration. The Court has now had this opportunity, and finds, for the reasons that will now be explained, that the Motion of the United States Trustee to Dismiss pursuant to 28 U.S.C. § 1746 should be Denied in both this Matter, as well as in the case of Paul Sielschott.

FACTS

As it concerns the merits of United States Trustee's Motion to Dismiss, the facts and circumstances in this case and in the separate case of Paul Sielschott are substantially identical. Consequently, on the merits of the United States Trustee's Motion to Dismiss, both cases will be discussed as one.

Just prior to October 17, 2005, the date on which the majority of the substantive provisions of BAPCPA[1] took effect, the Debtors filed a petition in this Court for relief under Chapter 7 of the United States Bankruptcy Code. Pursuant to procedures established in this bankruptcy district, the Northern District of Ohio, the Debtors' petition was filed electronically. Ericka Parker, an attorney in good standing in this Court, represented the Debtors in their bankruptcy, filing the electronic petition on their behalf.

In the electronic petition filed with the Court, both the Debtors' signature and Attorney Parker's signature were represented by the format of "/s/" followed by the person's name. Just prior to electronically filing their petition, the Debtors and their attorney physically signed the form entitled, "Declaration re: Electronic Filing of Documents and Statement of Social Security Number."[2] One week after their

1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

2. Pursuant to the "Administrative Procedures Manual" for Northern District of Ohio, Bankruptcy Courts, as adopted on September 6,

petition was electronically filed, the Court received and then docketed this Declaration. At no time during this process, however, did either the Debtors or Attorney Parker physically sign the bankruptcy petition.

Based upon the lack of physical signatures contained in their bankruptcy petition, the United States Trustee (hereinafter referred to as the "UST") commenced the instant action to Dismiss the Debtors' case without prejudice. As taken directly from the Motion of the UST, the "basis for this motion [to dismiss] is that the debtors did not actually sign any bankruptcy petition prior to the filing of a petition electronically." (Doc. No. 10, at pg. 1). In direct response, the Debtors, in addition to objecting to the UST's Motion, corrected the signature deficiencies in their petition, with both of the Debtors as well as Attorney Parker physically signing the petition. However, no record of this correction was entered in the Court's docket.

DISCUSSION

Bankruptcy Rule 5005(2) authorizes bankruptcy courts "to permit documents to be filed, signed or verified by electronic means . . ." Acting under this authority, the bankruptcy courts in the Northern District of Ohio have required that all documents filed with the court be accomplished through the district's "ECF" system (Electronic Case Filing); since this requirement was made mandatory at the beginning of 2004, the filing of a petition on paper, albeit with some limited exceptions, has not been permitted in this Court.

When the filing of bankruptcy documents is accomplished by electronic means, Bankruptcy Rule 5005(2), together with Bankruptcy Rule 9029, allow courts to adopt procedures and protocols to administratively handle the electronically filed documents.[3] The only limitation placed upon this authority is that such procedures and protocols be "consistent with but not duplicative of-Acts of Congress and these rules" and that they "do not prohibit or limit the use of the Official Forms." FED. R. BANK.P. 9029(a)(1); FED.R.CIV.P. 83. To this end, the bankruptcy courts in the Northern District of Ohio established and published an "Administrative Procedure Manual" for ECF. (General Order # 02–2; 03–1). Once implemented, all attorneys practicing in this District were required to sign an agreement whereby the provisions of this Manual, including subsequent modifications, were incorporated by reference.

[1] With conventional paper filings no longer permissible under the ECF system, the "Administrative Procedure Manual" set forth certain protocols to handle one of the natural consequences of adopting an electronic filing system: the lack of any originally signed documents, petitions included, on file with and maintained by the Court. Among other things, this procedural adaptation was necessary to maintain the integrity of the bankruptcy process; the purpose of a debtor's signature on a petition serves to verify that the facts set forth therein are correct. *Briggs v. LaBarge (In re Phillips)*, 317 B.R. 518, 523 (8th Cir. BAP 2004). The actual mechanics for handling documents that require a signature, but which are no longer filed with the Court, is handled in Part II, ¶ B, of the "Administrative Procedure Manual." The substance of the provisions set forth thereunder, which are precise

2002, by General Order No. 02–2, this form is required to be filed with the Court "whenever the initial document requiring the debtor's signature is electronically filed in a case . . . ."

3. Also see Rules 5(e) and 83 of the Federal Rules of Civil Procedure; Bankruptcy Rules 9011 and 9036; and Local Bankruptcy Rules 5005–2(b) and 9037–1.

and detailed, may be summarized as follows:

First, as to "registered user," primarily attorneys, the signature of an electronically filed document must be "indicated as /s/name." And as to any documents bearing the actual handwritten signature of the user, or the signature of a signer on whose behalf the user files the document (e.g., the debtor), it is required that the user maintain the document for a period of one year commencing from the time the case is administratively closed. (Part II, ¶ B(1)). As to a debtor, it is set forth that any document requiring the debtor's signature must be signed by the debtor, followed by the electronic submission of the document to the Court with the debtor's signature also being "indicated as /s/name."(Part II, ¶ B(2-a)).

As required, these signature protocols serve to compliment but not supplement the Bankruptcy Rules. In this way, Bankruptcy Rule 1008 sets forth that "[a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746." In addition, the official bankruptcy forms, as adopted under the authority set forth in Bankruptcy Rule 9009, provide that a debtor affix their signature to the petition, declaring, under penalty of perjury, as to the veracity of the information contained in the petition and setting forth that relief is requested under the Bankruptcy Code.

A fair, albeit technical, reading of the Bankruptcy Rules and official forms, together with this Court's ECF's Administrative Procedures, shows then that when represented by an attorney, there exist these signatory requirements: (1) although never filed with the Court, both the debtor and his or her attorney must physically sign a bankruptcy petition prior to it being filed; and (2) that once signed, debtor's legal counsel is to preserve the document for a period of one year following the closing of the case. It is the failure of the Debtors and Attorney Parker to abide by these requirements which forms the basis for the UST's Motion to Dismiss.

[2] On the position taken by the UST, neither the Debtors nor Attorney Parker dispute that fact that they failed to cause their signatures to be affixed to the Debtors' bankruptcy petition before it was electronically filed with the Court. Instead, Attorney Parker argues that dismissal is not an appropriate remedy in this case, describing it at the Hearing as akin to using a nuclear bomb to kill a fly. And on a number of different levels, the Court agrees.

[3] Bankruptcy courts are courts of equity, and equity holds that substance will prevail over form. *In re Madeline Marie Nursing Homes*, 694 F.2d 433 (6th Cir. 1982) (where the law is silent, bankruptcy courts, as courts of equity, will look through the form to the substance of any particular transaction). But the remedy sought by the UST,—that of dismissing the Debtors' case—elevates to new heights doing just the opposite: placing form over substances. On the one side, there is the Congressionally conferred right of bankruptcy relief; on the other, the UST seeks to have this statutory right overridden for what is plainly a technical violation of a protocol which is, itself, derived from what can only be termed a morass of interlocking procedural and administrative rules.

[4] In this very same way, the remedy sought by the UST does not fit within the very spirit of those Rules upon which it relies for its Motion to Dismiss. At their beginning, the Bankruptcy Rules provide that their scope is to be "construed to secure the *just* . . . determination of every case and proceeding." FED. R. BANK.P.

1001 (emphasis added). This same reading applies just as equally to the protocols set forth in the Administrative Procedures Manual for ECF, with the authority for their enactment being derived directly from the Bankruptcy Rules. FED. R. BANK.P. 5005.

[5] Additionally, the UST's Motion for Dismissal clashes with the statutory presumption that once commenced, a Chapter 7 bankruptcy case should proceed until the case is fully administered. *In re Barnette*, 309 B.R. 516, 518 (Bankr.N.D.Ohio 2004). This policy is reflected in § 707(a), which establishes that, as a minimum threshold, a case may only be dismissed "for cause" which may include, but is not limited to, (1) unreasonable delay by the debtor that is prejudicial to the creditors; (2) nonpayment of required fees and charges; and (3) the failure by the debtor to file certain required information. The action brought by the UST for dismissal, however, does not cite to any of these grounds, thus leaving this Court with no explicit statutory ground upon which to base the dismissal of the Debtors' case.

[6] To be sure, the "for cause" proviso of § 707(a) affords an independent basis for dismissal. Yet, while courts have wide latitude in making a determination as to the existence of "cause," as a minimum threshold this standard envisions the furtherance of a bankruptcy objective, not simply a debtor or other party's contention that its personal interest would be better served by a dismissal. *Id.* at 519. As an example, the Sixth Circuit Court of Appeals has held that "for cause" may be based upon a debtor's "lack of good faith." *In re Zick*, 931 F.2d 1124, 1127 (6th Cir. 1991). But in this case, absolutely nothing has been put forth or even alleged which would tend to show that the Debtors are not honest, and thus not deserving of the protections of the Bankruptcy Code. On the other side of the coin, the UST did not offer any satisfactory explanation as to how an objective of bankruptcy law would be furthered by dismissal. For example, it did not allege that the dismissal of the Debtors' case would be in the best interest of the Debtors' estate or their creditors.

Finally, practicable considerations dictate the inappropriateness of dismissal in this case. During 2005, approximately 80,000 petitions were filed in the bankruptcy courts in the Northern District of Ohio. When directly asked, the UST could only speculate on how many or what percentage of these cases could potentially give rise to the same issue as that presented here regarding a lack of original signatures. Even so, the UST acknowledged that the number could be from four hundred to as many as in the thousands.

The real potential therefore exists for a large scale unwinding of a process that has already been set well into motion, and on which potentially large numbers of people have relied—debtors and creditors both—and which has involved an incalculable number of hours of administration. Even this aside, the gravity of the UST's Motion to Dismiss on the bankruptcy process looms very large. At a minimum, the relief sought by the UST would place into the bankruptcy system a large amount of uncertainty as the die would be cast: mere technical violations of the Rules and Procedures of bankruptcy could very well result in the immediate dismissal of a large number of cases. Other questions, and concerns for their potential negative implications, also continue to spiral outward:

Will similar actions be brought in closed cases? Also, will similar actions be brought in Chapter 13 cases, including those in progress since the commencement of mandatory ECF filing? How will asset cases be handled? What efficacy will court orders involving transfers of proper-

ty have under § 363? Why wasn't the issue pertaining to original signatures immediately raised when mandatory ECF filing was implemented two years ago? Undoubtedly, these questions and their potential implications only begin to touch the surface, with the full impact of the UST's Motion to Dismiss simply being impossible to conceptualize at this juncture. Still, it is safe to say that if it were successful, the action brought by the UST to dismiss would serve to call into question the finality of bankruptcy orders and thus frustrate a central policy of the bankruptcy laws which is to promote the expedient administration of the bankrupt estate. *See Galt v. Jericho-Britton (In re Nucorp Energy, Inc.),* 812 F.2d 582, 584 (9th Cir. 1987).

It is this Court's duty, first and foremost, to protect the integrity of the bankruptcy process. *In re Commercial Fin. Servs., Inc.,* 247 B.R. 828, 848 (Bankr. N.D.Okla.2000). But when all the issues just discussed are considered,—that of procedure, substantive law and policy—the Court simply cannot square this duty with the UST's Motion to Dismiss. The Court is therefore invariably lead to but one conclusion: it would be highly inappropriate, as a matter of discretion, to dismiss this case.

[7] Yet, while the foregoing discussion has closed this Court to the option of exercising its discretion to dismiss this case, this alone is not dispositive to the outcome in this matter. To the contrary, the primary focus of the UST's position is that dismissal in this matter is not discretionary. Rather, the UST posits that the failure of Attorney Parker and the Debtors to sign the Debtors' bankruptcy petition constitutes a jurisdictional defect.

The jurisdiction of this Court, as a bankruptcy court, is created and defined by 28 U.S.C. § 1334. At its heart, this section confers upon the district courts, and therefore by extension this Court,[4] "original and exclusive jurisdiction of all *cases* under title 11." *Id.* at ¶ (a) (emphasis added). As the term is used in this section, a case is commenced by "the filing with the bankruptcy court of a petition by an entity that may be a debtor under such chapter." 11 U.S.C. § 301. *See also* 11 U.S.C. § 302 (for a joint petition). A bankruptcy court's jurisdiction thus arises when a petition in bankruptcy is filed.

For its Motion to Dismiss, the UST relies directly on this jurisdictional framework, but argues that a fatal defect exists therein on account of the Debtors' noncompliance with Bankruptcy Rule 1008. According to the UST, compliance with Rule 1008 is necessary for a petition to become legally operative so as to commence a case. And further, the Debtors failed to comply with this Rule when they failed to sign their bankruptcy petition, thereby depriving this Court of any jurisdiction because simply put, there is no case.

As set forth earlier, Bankruptcy Rule 1008 requires that all petitions, prior to being filed, be either verified, or contain an unsworn declaration as provided in 28 U.S.C. § 1746. Despite not signing their petition, the Debtors begin their argument in opposition by arguing that, regardless as to the jurisdictional implications of this Rule, they complied with its mandates when they signed, prior to their petition being filed, what is known as the "Declara-

4. 28 U.S.C. § 157(a) provides that "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." Pursuant to the General Order of Reference, bankruptcy cases in this district are referred to the bankruptcy courts.

tion re: Electronic Filing of Documents and Statement of Social Security Number." (Part II, ¶ B(2–b)). Among other things, this Declaration requires that both the debtor(s) and his or her attorney "declare under penalty of perjury" to the accuracy of the information set forth in the petition. This Document is prescribed in the "Administrative Procedure Manual," and is part and parcel of the Manual's signature requirements, also discussed earlier.

At this time, however, the Court is not willing to go so far as to accept the Debtors' argument that the signatures in the "Declaration re: Electronic Filing" serve to verify the petition within the meaning of Bankruptcy Rule 1008. First, as pointed out by the UST, the language in the Declaration is different from the Bankruptcy Forms, with the Declaration omitting the critical language that the debtor is requesting bankruptcy relief. Furthermore, the purpose of the Declaration is limited, being described in the "Administrative Procedure Manual" as confined to serving this function: "The purpose of the filing of the signature declaration form is to assure that the debtor's handwritten signature and Social Security Number are on file with the Court."(Part II, ¶ B(2–b)). This, however, still leaves open the more fundamental question: whether, as the UST argues, compliance with Rule 1008 is jurisdictional prerequisite?

It appears that nowhere in the Bankruptcy Code is it provided that a debtor, or for that matter their attorney, must sign a bankruptcy petition. Instead, signature requirements are Rule driven. But insofar as the Rules go, Rule 1008 does not constitute the last word on a petition's signature requirements.

Importantly, Bankruptcy Rule 9011, which by its specific terms applies to bankruptcy petitions, sets forth in the last sentence of paragraph (a) that an "unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the *attorney or party*." (emphasis added). Thus, Rule 9011 allows a party to correct a signature omission in a petition so long as they do promptly once learning of the defect. And compliance with this remedial measure occurred here; immediately after the UST filed its Motion to Dismiss, both Attorney Parker and the Debtors signed the Debtors' bankruptcy petition.

[8] The UST, however, while acknowledging the curative nature of Rule 9011, argues that its applicability does not extend to the particular circumstances presented in this matter. Two points were made in support. First, it is the position of the UST that the Rule's curative nature does not extend to the situation where a debtor is represented by an attorney. Second, the UST argued that by its use of the term "stricken," the Rule cannot operate to correct what is otherwise a jurisdictional defect that exists because of the omission of a signature. A review of applicable precedent, however, shows that neither of these points have legal support.

[9] Rule 9011, being derived from Rule 11 of the Federal Rules of Civil Procedure, is to be interpreted consistently therewith. *In re Coones Ranch, Inc.*, 7 F.3d 740 (8th Cir.1993). To this end, the Supreme Court in *Business Guides, Inc. v. Chromatic Communications Enter., Inc.*, rejected the UST's first position that Rule 11 will not apply to a represented party's signature. 498 U.S. 533, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991). In coming to this holding, the Court held that regardless of whether a represented party is required to sign a document, when they do, Rule 11 will apply:

> The only way that [a party] can avoid having to satisfy the certification standard is if we read "attorney or party" as used in sentence [5] to mean "attorney or unrepresented party." Only then would the signature of a represented party fall outside the scope of the Rule. We decline to adopt this unnatural reading, as there is no indication that this is what the Advisory Committee intended.

Id. at 929. The second point of opposition raised by the UST as to Rule 9011's inapplicability also does not comport with the Supreme Court's jurisprudence on Rule 11.

It is the position of the UST that by Rule 9011's use of the term "stricken," it does operate to correct what would otherwise be a jurisdictional defect. However, in *Becker v. Montgomery,* the Supreme Court, when addressing the jurisdictional nature of the Federal Rules of Appellate Procedure, held that the omission of a signature was "not a jurisdictional impediment to pursuit of his appeal." 532 U.S. 757, 765, 121 S.Ct. 1801, 1807, 149 L.Ed.2d 988 (2001). As a part of its decision, the Court observed:

> Civil Rule 11(a), in our view, cannot be sliced as amicus proposes. The rule was formulated and should be applied as a cohesive whole. So understood, the signature requirement and the cure for an initial failure to meet the requirement go hand in hand. The remedy for a signature omission, in other words, is part and parcel of the requirement itself. Becker proffered a correction of the defect in his notice in the manner Rule 11(a) permits-he attempted to submit a duplicate containing his signature, and therefore should not have suffered dismissal of his appeal for nonobservance of that rule.

Id. Besides just Rule 9011, a signature defect and its effect on jurisdiction also needs to be placed in a larger context.

Bankruptcy Rule 5005(a)(2) provides that a document filed by electronic means, when so required as here by local rule, constitutes a "written paper" for purposes of applying the Bankruptcy Rules.[5] This may be termed "the electron equals paper rule." Thus, when all the layers are removed, the issue of electronic filing, and its maze of procedural rules and protocols, is somewhat misleading. Rather, the underlying question presented in this matter by the UST is really one of whether the lack of a debtor's physical signature on a petition, whether filed by paper or electronically, constitutes a jurisdictional defect. Stated differently, if the lack of a debtor's signature on a petition was not a jurisdictional defect then (pre-electronic filing), it should not be now (post-electronic filing). It is in this way that the position taken by the UST completely runs aground.

In the absence of an intent to the contrary, a defect in a procedural rule will not deprive a court of jurisdiction. *See* 5A C. Wright & A. Miller, Federal Practice and Procedure § 1339. It has thus been held for some time that as it concerns a bankruptcy petition "imperfect verification is not a jurisdictional defect" and that an "amendment may cure imperfect verification[.]" *In re Royal Circle of Friends Bldg. Corp.,* 159 F.2d 539, 541 (7th Cir. 1947). More recently, this same conclusion was reached, with it being decided that when a bankruptcy petition is not properly verified, the "absence of proper

5. In full, Bankruptcy Rule 5005(a)(2) provides:

> A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

verification does not deprive a bankruptcy court of jurisdiction over the petition." *Paccar Fin. Corp. v. Mid–American Lines, Inc. (In re Mid–American Lines, Inc.)*, 178 B.R. 514, 516 (D.Kan.1995).

Additionally, these decisions are actually just a subset of a larger group of cases which hold that any defect in a petition, even those not involving verification, will not alone be jurisdictionally fatal. For example, in *In re Lagniappe Inn of Nashville*, the bankruptcy court held that it was not deprived of jurisdiction where, in direct violation of Bankruptcy Rule 1005, there existed a defect in the caption of a bankruptcy petition. 50 B.R. 47 (Bankr. M.D.Tenn.1985). Likewise, a debtor's failure to set forth in their petition the Chapter of the Code under which they are seeking relief is not a jurisdictional defect. *Mullis v. United States Bankr.Ct. for the Dist. of Nev.*, 828 F.2d 1385, 1389 (9th Cir.1987).

[10] Cumulatively then, these decisions demonstrate that a procedural violation of a Bankruptcy Rule, let alone an administrative protocol, even when involving a document's verification, is alone an insufficient basis for granting a motion to dismiss for lack of jurisdiction. *In re Aspen Healthcare, Inc.*, 265 B.R. 442, 447 (N.D.Cal.2001), *citing Fitzsimmons v. Nolden*, 920 F.2d 1468, 1472 (9th Cir.1990). This just makes sense. First, rules of procedure are promulgated by the courts, and thus it would be a rather odd situation if a court were deprived of jurisdiction solely because of a party's violation of the court's own rules. In a similar way, the remedy of dismissal for the failure to physically sign a petition leads to a rather anomalous outcome: a debtor's ability to obtain relief from this Court would be dependent upon an event taking place, whose occurrence will never become a part of the record in the case.

Additionally, and as a more practicable matter, a contrary holding would leave the bankruptcy system dangerously open to manipulation. This is particularly true in a Chapter 7, where a debtor has no right to dismiss their case, but where this requirement could be easily bypassed simply through the convenient "*loss*" of the "*unsigned*" petition by the debtor's attorney. Additionally, as it regards the manipulation of the bankruptcy process, it is observed that for criminal violations of the Bankruptcy Code, a debtor is defined as that "concerning whom a petition is filed under title 11." 18 U.S.C. § 151. Thus, carrying the UST's position to its logical conclusion,—that an unverified petition is not a legally effective petition, thereby depriving a court of jurisdiction—a person who never signs their petition could viably argue that they are not a debtor for purposes of the commission of a bankruptcy crime. Clearly, neither of these results could have been the intent of the Congress of the United States when it conferred Title 11 jurisdiction to the bankruptcy courts and the district courts.

For all these reasons then, this Court cannot accept the UST's position that the lack of debtor's signature on a petition, whether filed by paper or electronically, deprives this Court of jurisdiction over the case. The only two cases cited to by the UST as support for its position do not contradict this position: *In re Wenk*, 296 B.R. 719 (Bankr.E.D.Va.2002); *Briggs v. LaBarge (In re Phillips)*, 317 B.R. 518 (8th Cir. BAP 2004). While both these cases involved an attorney filing a petition without a debtor's proper signature, the issue before the courts was not one of jurisdiction, but rather the appropriateness of sanctions. Moreover, a reading of these cases shows that although sanctions were imposed, jurisdiction seems to have been assumed.

In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Opinion.

Accordingly, it is

ORDERED that the Motion of the United States Trustee to Dismiss, be, and is hereby, DENIED.

In re Kevin/Adrienne KOLIBA, Debtors.

No. 05-74612.

United States Bankruptcy Court, N.D. Ohio.

Jan. 20, 2006.

Background: United States Trustee (UST) filed motion for disgorgement of fees by debtors' attorney, based on attorney's violation of protocol governing the electronic filing of bankruptcy petitions by failing to maintain signed copy of petition in her files.

Holding: The Bankruptcy Court, Richard L. Speer, J., held that disgorgement of fees was not appropriate sanction for attorney's good faith violation of protocol, that had not resulted in any damage to her debtor-clients.

Motion denied.

1. Bankruptcy ⇐3204

Bankruptcy courts have authority to review all professional fees paid to debtor's attorney. 11 U.S.C.A. §§ 329(a), 330.

2. Bankruptcy ⇐2187

Inherent in bankruptcy court's authority to review all professional fees paid to debtor's attorney is power to issue sanctions, including disgorgement of fees, when attorney fails to satisfy requirements of the Bankruptcy Code and Rules.

3. Attorney and Client ⇐14, 32(4)

Attorneys are officers of the court as well as professionals, and as officers of court, they are held to high standard regarding their knowledge of court rules and administrative procedures.

4. Bankruptcy ⇐2187

In absence of very extenuating circumstances, attorney may not plead ignorance of procedural rules as a defense in proceeding to sanction him for violating such rules.

5. Bankruptcy ⇐2187

Attorney who fails to comply with court's procedural requirements may be subject to sanctions.

6. Bankruptcy ⇐2187

Disgorgement of fees is extreme sanction, and should generally be imposed on attorney by bankruptcy court only when attorney violates those specific provisions of the Bankruptcy Code and Rules which directly govern attorney's duties, responsibilities and qualifications as professional before the court. 11 U.S.C.A. §§ 327-331; Fed.Rules Bankr.Proc.Rules 2016, 2017, 11 U.S.C.A.

7. Bankruptcy ⇐2187

When bankruptcy court metes out a sanction, it must do so with restraint and discretion, and the sanction levied must be commensurate with egregiousness of conduct.

Ms. SÁNCHEZ. Thank you for your testimony.
Ms. Powers?

TESTIMONY OF MARY POWERS, ESQUIRE, FORMER UNITED STATES TRUSTEE PROGRAM TRIAL ATTORNEY, AMHERST, NY

Ms. POWERS. Thank you for the opportunity to speak today.

Quite frankly, it was a difficult decision for me to come here today. On the one hand, I believe the United States Trustee's offices are filled with intelligent, hardworking individuals who care about the mission of the United States Trustee, working to promote the integrity and efficiency of the bankruptcy system. Many of these people are sittin here today.

On the other hand, it was my distinct feeling, based on my over 4 years employment there, that the policies and the practices of the United States Trustee were moving farther away from its mission to the integrity of the system. I felt that it was going to be less and less about justice, and, at some levels, actually served as an impediment.

It is that experience that brings me here to testify today. My written testimony speaks for itself. Buffalo, in western New York, is a community where economic hardship is a reality and has been so for a number of years, most of my life, actually.

Buffalo was recently cited as the second poorest city in America. Clearly, abusive bankruptcy filings were not prevalent. The majority of cases where inquiries had been made on our part, in an effort to stem any tide of abuse, there would be notable mitigating factors.

The United States Trustee Program had implemented a reporting system. They called Significant Accomplishment Systems. They called it SARS. It was sort of like a report card, a quarterly report card. And once I started to do that report card every quarter, it became even more apparent, because it confirmed the obvious, that western New Yorkers were down on their luck. Entry after entry noted job loss, loss of medical benefits and often marital dissolution. But, unfortunately, that reality didn't seem acceptable in the climate of the current office of the United States Trustee.

The belief was that you must not be looking hard enough if you don't find cases of abuse, and I recount two personal examples in my testimony, ones that, in my career, may seem minor, but they did really strike home.

The first is when then director Larry Friedman came to town and he pulled one of our inquiry files. It was that of a retired teacher and his wife, and Mr. Friedman immediately asked where the boat was. We weren't sure what he meant. He said, "Well, all retired teachers have boats."

I stated I wasn't personally aware of the connection between retired teachers and boats, but at his direction, we did a detailed document request for his review. And we conducted a review, and he flew back into town to conduct an examination of the debtors.

Mr. Friedman found no intentional ommission of assets. The case was eventually converted to a 13, which would have happened anyway. That is what we had targeted it for.

Now, Buffalo is a small community. Lawyers cooperate with one another and results can be achieved without putting all parties through these rigorous hoops.

We understood that, sadly, the view from the top was that the debtors and their attorneys were to be looked at as the opposition, and that simply was not the case, at lease not in Buffalo, New York. And, unfortunately, the emphasis on the numbers only became worse after the passage of the new law.

I left when I realized that independent judgment was not valued or sought after in the program.

I recount the example of the United States Trustee in Region 2 inquiring about a garden variety case, one that wasn't abusive in any way. I immediately thought we must have missed something—but it reinforced my belief that it was all about the numbers, and about micromanaging and bureaucracy was only getting worse.

It was hard for me to believe that someone at that level would not have something more important on her plate than that.

And I felt, when I realized my personal credibility and my integrity was at risk and one well-respected attorney told me that the U.S. Trustee had become a known as the "useless Trustee's office."

On a personal level, I also couldn't imagine spending the rest of my career looking at telephone bills and determining if "grandma" was part of the household, especially when those endeavors meant very little in terms of monetary returns to individual creditors.

It just seems to me, and the reason I am here today, is that the talent and dedication of the staff that I was lucky enough to work with in Buffalo, and that the people that I met from all around the country could be used to serve the system of justice in a much more effective manner.

[The prepared statement of Ms. Powers follows:]

PREPARED STATEMENT OF MARY POWERS

My name is Mary Powers and I am an attorney who for the majority of my twenty year legal career practiced bankruptcy law. I was fortunate to begin my career as confidential law clerk to the Honorable Beryl E. McGuire, Chief Judge for the United States Bankruptcy Court for the Western District of New York. After that I worked for two well respected Buffalo law firms, representing debtors, creditors and creditor committees in a variety of bankruptcy matters. In 2002, I applied for the position of Trial Attorney in the Buffalo office of the United States Trustee ("UST"). At that time, I was very happy at my law firm, received challenging work, was well compensated and, above all, was respected by my colleagues just as I respected them for their integrity and dedication to their clients. There was only one legal position which would have prompted me to leave this wonderful working environment and that was a position with the Department of Justice's United States Trustee's Office. I felt my background was ideal, but more importantly, I felt that it would be an honor and a privilege to serve the Department of Justice in its mission to promote the integrity and efficiency of the bankruptcy system. It was a chance, for the lack of a better phrase to "wear the white hat". I felt very fortunate to have been offered the position. Over time, it became clear to me however, that what I was doing had very little to do with "justice" and, as such, my personal passion and enthusiasm slowly eroded. In February 2007, not wanting to spend the remainder of my career doing something that I had trouble believing in, I resigned. I have never once regretted that decision.

Upon my arrival, I came to understand more clearly what was meant by "civil enforcement "and that the UST was now considered a litigating component of the Department of Justice. I had enough experience at that time to realize that the Buffalo office did not have the resources to be a true "litigating force", but I was optimistic that I could still make a difference, elevating the level of practice and protecting both debtors and creditors. During my years, little focus or training emphasized creditor abuse. I quickly came to understand that ferreting out abuse by debt-

ors was of primary importance. I screened numerous filings. Through inquiries of debtors and their attorneys, I confirmed what I could have intuitively guessed from being a Buffalo and Western New York native. The majority of filings were not abusive. Buffalo's poor economy caused loss of jobs, loss of medical benefits and often marital dissolution, due in large part to financial setbacks. These factors were at the heart of the vast majority of filings. This became very apparent when the UST implemented a reporting system (one of many) known as SARS ("Significant Accomplishments Reporting System"). Every action taken by staff was to be documented in this system. Every entry where no action was taken referred to a "mitigating factor" which obviated the need for any action. "Cancer", "job loss", "divorce" were noted frequently, demonstrating what I knew to be the case: that Western New Yorkers were down on their luck. When an abusive filing was found, dismissal or conversion to Chapter 13, was pursued with vigor, but always understanding that the judges in the Buffalo Bankruptcy Court were very aware of the harsh economic realities in Western New York and gave debtors every consideration. Initially it never occurred to me that those in Washington and New York would not trust the assessments of seasoned lawyers, those hired by them for their expertise and experience. I thought it was common sense and easily understood that regions and individual districts differed significantly in their bankruptcy demographics. I learned later that I was quite naïve in that belief.

I became aware that the debtor abuse "numbers" for the Buffalo office were low and that offices that had low numbers were perceived as not looking hard enough to find abuse. This became very apparent when then Director Lawrence Friedman on a visit to the Buffalo office pulled one of our "inquiry" files and concluded on its face that a debtor examination should take place and he would "show us how it was done". He told us that as the debtor was a retired teacher it was likely he had a boat, although none was listed. I was not familiar with the link between retiring teachers and boats, but I assured him I would investigate and do a detailed document request for his review prior to his return to conduct the examination of the debtors. Our independent investigation revealed no intentional omission of assets on the debtors' schedules. The examination done by Mr. Friedman also revealed nothing. The debtors were sincere and honest and nothing warranted the dismissal of their case. The case was flagged by our office for one more appropriately in Chapter 13 which is my recollection of what ultimately happened in the case. I feel certain that this result, as had occurred with other similar cases, would have occurred without the burdensome document requests and a lengthy examination of the debtors. Buffalo is a small community of bankruptcy practitioners and my experience led me to know that for many cases aggressive pursuit was unnecessary to achieve the same result. Unfortunately, as we did not conduct as many unnecessary examinations as other districts , we appeared less aggressive. Again, I felt that we understood the practice in our district best and there was no need to put the debtors and their attorneys through unnecessarily burdensome "hoops" if the same result could be achieved in a more timely and cost efficient manner for all involved. I felt that treatment of attorneys and debtors in that manner raised our credibility with the bench and bar, fostered cooperation and promoted a much more efficacious system. Unfortunately, the opinions of those in the "trenches" in the individual offices seemed to matter very little. Although, the same information could be easily obtained at a meeting of creditors, we would have gotten more "credit" from the powers that be had we engaged in costly examinations and document requests. Our "SARS" report, a seeming "report card", certainly wasn't impressive to those who measured success in terms of dismissals and conversions only. Unfortunately, we could not manufacture "abuse" where little existed. Even when we did obtain a conversion to Chapter 13 and the total amount of unsecured debt deemed nondischargeable was entered as the result, in truth, most of that debt would be ultimately discharged because the majority of Chapter 13 payment plans were of a very low percentage. If the case was dismissed, it was likely very little of that debt was collectible either. We understood however, that it was partially these numbers that the Office of the United States Trustee relied upon to justify its existence and demonstrate success. Feeding the SARs machine at times seemed as important as practicing meaningful law.

The lack of autonomy and inability to exercise discretion as well as the pressures to produce "numbers" was exacerbated after the passage of BAPCPA in October of 2005. Admittedly, the UST was forced to comply with a new law everyone was struggling to understand and certainly there would and should be uniformity in policies regarding application, but again the same pressures to produce presumed abuse under the "means test" was paramount. I remember one pivotal moment for me after the passage of the new bill. I, through the Assistant UST in the office, learned that the US Trustee in the region asked about a specific case. My first

thought was that despite a multi-level screening process, something big must have been missed. When I reviewed the filing, I realized that the case wasn't flagged because the debtor was only slightly over the median and had a blended family with six children and all the legitimate expenses that accompany a family of that size. You didn't need the means test to figure that out. Common sense and living in the real world would have sufficed. More importantly, I was incredulous that someone at the level of a UST would not have something more important on her plate than this insignificant case from Buffalo. It was clear that "babysitting" was the order of the day and that the most important focus of the UST was accounting for "debtor abuse" and raising the numbers for statistical purposes. It was that day when I knew I could not spend the rest of my career in a micromanaging bureaucracy. I also knew that the satisfaction that would arise from pouring over cell phone bills and determining if "grandma" was part of the household would be nonexistent, especially when ultimately it would make very little monetary difference to creditors. As one well respected Buffalo attorney told me, the UST had come to be known as the "useless Trustee's office", not a flattering nickname, but one I sadly understood.

The most unfortunate aspect of this to me was that the Office of the United States Trustee employed many intelligent, hard working individuals all over the country, many of whom I was fortunate to work with and to meet. Those individuals produced many wonderful initiatives over the years. Many of them expressed frustrations similar to those I have expressed, but obviously only one who left government employment would feel free to speak. In closing, it is my belief that the mission of the Office of the United States Trustee is admirable however, the current execution of the mission is flawed, an impediment to the functioning of the system and does very little to promote the integrity of the system.

Ms. SÁNCHEZ. Thank you, Ms. Powers, for your testimony.

At this time, I would invite Judge Wedoff.

TESTIMONY OF THE HONORABLE EUGENE R. WEDOFF, JUDGE, UNITED STATES BANKRUPTCY COURT, NORTHERN DISTRICT OF ILLINOIS, CHICAGO, IL

Judge WEDOFF. I appreciate the opportunity to be here for the purpose of offering a different perspective on the U.S. Trustee Program.

I understand the question the Committee wants to ask is whether the program has been administering the bankruptcy system in an over-aggressive manner, like an attack dog, or whether it has been safeguarding the integrity of the bankruptcy system, like a watch dog.

I have been a bankruptcy judge for 20 years. I have been on a number of organizations actively that work to support the bankruptcy system and I have presided over big cases, like the United Airlines case. But the reason that I want to talk to the Committee today is because of the experience I have had from my appointment to the Advisory Committee on Bankruptcy Rules.

When, what I will call BAPCPA, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, was enacted, there were 6 months—180 days to enact a whole host of new rules and forms to implement BAPCPA, and one of the most difficult tasks was to implement the new means tests that were created to establish abuse in chapter 7 cases.

I was appointed, as a new Member of the Committee, to a three-member working group to devise a means test form, to draft one for the Committee. The other members of that working group were Eric Frank, who is now a bankruptcy judge in Philadelphia, but he was then a longstanding consumer debtor attorney, and Mark Redmiles, who was then the enforcement coordinator for the U.S. Trustee Program.

The three of us, over that 6-month period, spent literally hundreds of hours drafting, debating, revising means test forms, not just for chapter 7, but for chapter 13 and chapter 11, as well. The work was necessarily complex, because the statute is complex.

Our chapter 7 means test form, as you mentioned, Madam Chairwoman, has 57 different lines over six pages, not because we wanted to make it complex, but because the law required that.

Obviously, over that period of time, Mark, Eric and I got to know one another really well, and what I want to convey to the Subcommittee today is the very firm impression I have that Mark Redmiles and the U.S. Trustee Program, throughout this process, not just with the means test, all of the considerations of the rules committee, were not out to attack debtors.

To the contrary, the impression I had throughout this process was that they were working with integrity and fairness, to read the statute properly and come up with a workable result.

Now, in my written testimony, I focused on two concrete examples that I thought would illustrate the approach of the U.S. Trustee Program in the rulemaking process. Both of them involve the implementation of the needs test and the needs test form, and they both have the potential to impose significantly greater burdens on debtors than the ones that we actually adopted.

The first of these has to do with the safe harbor of section 707(b)(7) of the bankruptcy code. This makes it impossible for any means test presumption to be asserted against a debtor who has below median income and the impact of that is that the debtor's income alone immunizes the debtor from the means test.

However, there is statutory language suggesting that a debtor might have to complete all of the calculations of the means test in order to comply with the reporting requirement and, in fact, some of the creditor organizations that promoted BAPCPA argued to the rules committee that regardless of income level, a debtor had to complete the entire form.

It would make a huge difference if the debtor can complete only the income portion, 14 lines, less than a page and a half. If they have to complete the entire form, six pages, 57 lines.

The U.S. Trustee Program from the beginning rejected the viewpoint of the creditor industry and asserted that the proper reading allowed only partial completion of the form by low income debtors.

The second point that I brought out has to do with the local housing standards, local standards of the IRS. These are used to determine debtors' deductions in the mean test for housing and transportation.

There is a number given by the IRS. The statute directs that the debtor's deduction for housing and transportation shall be the number set forth in the IRS local standards. Again, the creditor industry read the statute differently. They said that the numbers that the IRS published were only half.

Under that view, the debtor would have to list mortgage, rent, utilities, insurance, all of those items separately on the form and then compare them to the IRS numbers. Again, the U.S. Trustee Program took the position that the shorter version, the IRS number, would be appropriate.

What is the bottom line? In all of these—in most of these and other instances, the U.S. Trustee Program had the opportunity, had it chosen, to essentially attack debtors—the title of this hearing. They declined to—Instead they acted with integrity, with fairness, and they helped us produce a workable result.

I was grateful to Mark, grateful to the U.S. Trustee Program, and, I have to say, heartened to learn in August that Mark Redmiles was named deputy director of the U.S. Trustee Program. I think he is taking that position in a very positive direction.

[The prepared statement of Judge Wedoff follows:]

PREPARED STATEMENT OF THE HONORABLE EUGENE R. WEDOFF

Testimony of Eugene R. Wedoff
Unites States Bankruptcy Judge
Northern District of Illinois

Hearing on the United States Trustee Program:
Watchdog or Attack Dog?

Before the Subcommittee on Commercial and Administrative Law
Judiciary Committee
U.S. House of Representatives

October 2, 2007

Madam Chairman Sánchez, Ranking Member Cannon, and Members of the Subcommittee, thank you for inviting me to testify before you today on the question of how the United States Trustee Program has been exercising its responsibility to administer our bankruptcy system: specifically, whether it has been acting in an overaggressive fashion—like an attack dog—rather than as a protector of the system's integrity—like a guard dog.

My name is Eugene Wedoff, and I hope that I can bring to the Subcommittee a useful important perspective on this question, a perspective drawn from working closely with the United States Trustee Program.

I have been a bankruptcy judge for 20 years, and have been an active member of several organizations dedicated to advancing the effectiveness and fairness of the bankruptcy system, including the American Bankruptcy Institute and the National Conference of Bankruptcy Judges—both of which I currently serve as Secretary—the American College of Bankruptcy, and the National Bankruptcy Conference. I have had the duty of presiding over the bankruptcy cases of United Air Lines and its related corporations, and I have previously testified before the Subcommittee on Commercial and Administrative Law during its consideration of a predecessor of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005—which I refer to as BAPCPA. But the perspective that I want to offer to the Subcommittee today comes from my appointment to the Advisory Committee on Bankruptcy Rules in 2004, just before the passage of BAPCPA.

As the members of the Subcommittee are aware, BAPCPA made substantial changes in bankruptcy practice—particularly in consumer bankruptcy practice—and these changes required a host of new and amended rules and forms for their implementation. One fundamental change made by BAPCPA was a limitation on the right of debtors to obtain a "fresh start" discharge under Chapter 7 of the Bankruptcy Code (Title 11, U.S.C.), freeing their future income from the claims of creditors. The limitation I refer to is the new presumption of abuse, added to § 707(b) of the Code. This presumption of abuse—generally referred to as "the means test"—arises under

§ 707(b)(2)(A) if the debtor's income, less allowed deductions for living expenses and specified debt payments, exceeds defined amounts. Section 707(b)(2)(C), in turn, specifically requires Chapter 7 debtors to file "a statement of . . . the calculations that determine whether a presumption of abuse arises." BAPCPA emphasized the importance of this "means test statement" by amending § 2075 of Title 28—the provision that authorizes the Supreme Court to prescribe bankruptcy rules and forms—to provide: "The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) . . . ." Thus, BAPCPA mandated creation of a means test form.

Ordinarily, from initial conception to adoption, the process of creating bankruptcy rules under § 2075 takes at least three years, and new forms at least two years, to allow time for publication, public comment, and review of comments by the Advisory Committee on which I serve, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and by the Judicial Conference itself. However, BAPCPA became effective 180 days after its enactment in April of 2005, and so there was a need for a vastly accelerated process of rules and form creation.

In this process, I was assigned to a working group of three persons to create a draft means test form that the Advisory Committee could consider. The other two members of the working group were Eric Frank—now himself a bankruptcy judge in Philadelphia, but then an attorney in private practice with an extensive career in representing consumer debtors—and Mark Redmiles, then the National Civil Enforcement Coordinator of the Executive Office for U.S. Trustees (the EOUST). Between April and October, 2005, when BAPCPA went into effect, the three of us spent hundreds of hours creating, revising, and debating the content of a means test form. A quick count of my email inbox from that period reflects 128 messages from Mark Redmiles alone on the subject. What emerged from our work together was a set of three forms, one for Chapter 7 of the Code, one for Chapter 11, and one for Chapter 13, designed to report information related to the means test that would be relevant in those chapters. The Chapter 7 form set out 57 lines of detailed reporting requirements on six pages of text. On October 5, our work, as promulgated by the Judicial Conference, became Official Bankruptcy Forms 22A, B, and C, available just in time for BAPCPA's effective date.

Throughout the process of creating these forms, it was never my impression that Mr. Redmiles and the EOUST saw their role as one of attacking debtors or making the process of obtaining bankruptcy relief more difficult than BAPCPA requires. To the contrary, Mr. Redmiles operated with integrity and fairness, giving each of the many issues that arose his independent judgment as to the best way of implementing the requirements of BAPCPA. His work was completely supported by the EOUST's senior leadership, including its then acting director, Cliff White, who is testifying here today.

To illustrate the basis for this conclusion, I want to ask your indulgence to discuss two important details of the means test: a safe harbor for below-median income debtors and expense deductions for housing and transportation. I point to these details because they raised questions that BAPCPA does not clearly answer, and as to which

Mr. Redmiles and the EOUST took positions that made the means test forms easier for debtors to use, despite reasonable arguments to the contrary.

The safe harbor. Section 707(b)(7) of the Code, added by BAPCPA, provides, in effect, that only debtors with above-median income can be subject to a means test presumption of abuse. However, it accomplishes this result in what might be seen as a roundabout way: if a debtor's income is equal to or below the median, § 707(b) denies all standing to assert the presumption. Specifically, for those whose income does not exceed the median, no one—not judges, U.S. trustees or bankruptcy administrators, case trustees or any other party in interest—is allowed to file a motion under § 707(b)(2), the paragraph that sets out the means test presumption. But creating the safe harbor from the means test deduction in this indirect way, by denying standing, left a question for the means test forms. Like the proverbial question about whether a tree falling in the forest makes a noise if no one is there to hear it, the question for the means test form was whether a presumption of abuse can arise if no one is able to assert it.

The answer to this question had a huge impact for below-median income debtors. Section 707(b)(2)(C), as I noted earlier, requires Chapter 7 debtors to file "a statement of . . . the calculations that determine whether a presumption of abuse arises." In order to show that their income does not exceed the applicable median, a debtor has to complete a maximum of 14 lines—less than a page and a half of the form. If that showing of below-median income conclusively establishes that a presumption of abuse does not arise, then the debtor would not have to complete the remaining four and a half pages of detailed deductions for living expenses and debt payments. However, if there can be a presumption of abuse even though no one can assert it, then every debtor, regardless of income level, would have to complete the entire form. This latter view has been advocated by major creditor groups that supported BAPCPA. In a comment submitted to the Rules Committee on February 15, 2007 (06-BK-055), The American Bankers Association, the American Financial Services Association, America's Community Bankers, the Consumer Bankers Association, The Financial Services Roundtable, and the Independent Community Bankers of America advocated that "Form 22A [should] require all debtors to provide the need-based calculations," because the § 707(b)(7) safe harbor "contains no exemption from the requirement that the needs-based calculation be completed."

From the beginning of the process of adopting the means test forms, the EOUST took the contrary position—that if a presumption cannot be asserted it effectively does not arise—thus allowing lower income debtors to avoid substantial additional collection and reporting of expense and debt payment data. The EOUST adhered to this position despite critical comments from the credit industry. The forms that went into effect in October 2005 and those in effect now, direct debtors not to complete the balance of the form if their income does not exceed the median.

Housing and transportation deductions. For debtors whose income does exceed the minimum, the second question arose, involving the debtor's expenses for housing and transportation. BAPCPA created this question in § 707(b)(2)(A)(ii)(I) of the Code, which provides that one part of a debtor's deductible expenses shall be "the debtor's applicable monthly expense amounts specified under the . . . Local Standards

. . . issued by the Internal Revenue Service." The Local Standards that the statute refers to are published on the IRS's website, and they include various amounts for housing and transportation, depending on the debtors' family size and county of residence (for the housing deduction) and number of vehicles leased or purchased (for the transportation deduction). The question arises because, in applying its Local Standards in the collection of delinquent taxes, the IRS uses the Local Standard amounts as caps on taxpayers' actual expenses. Thus, in determining how much income is available for tax payments, the IRS requires taxpayers to establish exactly what expenses they incur for housing and transportation, and allows a deduction either in that amount or the applicable Local Standard amount, whichever is less. However, because § 707(b)(2)(A)(ii)(I) provides that the debtor's monthly expenses "shall be" the amounts specified under the Local Standards, the statute appears to adopt the Local Standards as allowances, not caps. So read, BAPCPA directs debtors in bankruptcy to claim deductions in the Local Standard amounts without having to show that their actual expenses meet or exceed those amounts.

In general, our working group attempted to implement a policy that the Advisory Committee applies to all of its work: avoid resolving ambiguous statutory provisions in rules or forms and instead preserve such questions for resolution by the courts. However, with the means test forms, this policy could not always be put into effect. For example, with the safe harbor issue noted above, there was a need to instruct below-median income debtors either to complete the deduction portions of the form or not complete them. So here, the forms needed either to direct debtors to itemize their actual housing and transportation expenses (rent or mortgage payments, insurance, maintenance, utilities, taxes, fuel, public transportation costs, etc.) so that these amounts could be compared to the Local Standards, or else to omit such reporting requirements, with the Local Standard amounts always used to determine the appropriate deductions. Again, from the beginning of our work, Mark Redmiles and the EOUST read the statute in the manner easier for debtors to comply with, and in a manner that gave some debtors a larger deduction. Again, creditor interests that had supported BAPCPA disagreed, as reflected in Comment 06-BK-035, which I referred to earlier, and a separate comment, 06-BK-051, submitted on behalf of the Financial Services Roundtable, each of which argued for Local Standard deductions no greater than a debtor's actual expenses. The Advisory Committee and the Judicial Conference adopted the position supported by the EOUST, and that is the position adopted by the means test forms currently in place.

Conclusion. To conclude my testimony today, let me put my observations in the blunt language of the title of this hearing: The process of developing the means test forms provided a clear opportunity to "attack" debtors with what I believe would have been substantially greater reporting requirements than those now in the means test forms. The United States Trustee Program did not mount this attack. To the contrary, the program took principled and independent contrary positions. Mark Redmiles, in particular, worked constructively and creatively with Eric Frank and me to read BAPCPA fairly and devise forms that would—to the extent of our ability—both honor its language and produce workable results. I came away from the process with great respect both for Mark—and the work of the EOUST generally—in assisting the Advisory Committee on Bankruptcy Rules.

As a postscript, I was pleased to learn that in August of this year, Mark Redmiles was appointed to the position of Deputy Director of the EOUST. I am confident that he is bringing to that position the same integrity and independent thought that he brought to the Advisory Committee.

I would be happy to answer any questions about this testimony.

Ms. SÁNCHEZ. Thank you very much for your testimony.

The bell is ringing to vote. In the absence of anybody telling me that we have votes shortly, we will proceed to Mr. Uyehara.

TESTIMONY OF PAUL M. UYEHARA, ESQUIRE, COMMUNITY LEGAL SERVICES LANGUAGE ACCESS PROJECT, PHILADELPHIA, PA

Mr. UYEHARA. Chairman Sánchez, Ranking Member Cannon, Members of the Subcommittee, thank you for the opportunity to testify today.

I would like to clarify for the record, as indicated in my written testimony, that I am also testifying this afternoon as a member of the National Association of Consumer Bankruptcy Attorneys, whose members probably represent the bulk of the attorneys filing consumer bankruptcy cases.

My written testimony details seven problems with U.S. Trustee policies and practices, but really those problems, those seven problems, could be summarized by the failure of the Executive Office for U.S. Trustees UST programs to act in a way that is fair, rational and reasonable. In fact, it is doing things in an unfair, irrational and unreasonable manner.

As a component of the justice department, the public has a right to expect the executive office for U.S. Trustees to be fair. They are opposed to bankruptcy fraud, no one will argue.

Rather than opposing fraud from debtors and creditors alike, UST programs focus almost exclusively on looking for alleged debtor abuse, while making little effort to root out abuse by creditors and their attorneys.

On a daily basis across the country, attorneys are filing bogus claims on behalf of creditors. They are filing motions falsely claiming homeowners are behind a mortgage payment, backed up, in some cases, by pre-signed affidavits. Debtors are losing sleep, money for attorney's fees and their homes from fraud like this, but the EOUST acts as if only debtor fraud is worth fighting.

We think fraud is fraud and fair is fair. We also think it unfair for EOUST to have engaged in discrimination based on debtors' ability to speak English, in violation of Executive Order 13166 and DOJ policy. They are refusing to provide interpreters for debtors to participate in mandatory meetings of creditors, telling debtors to hire their own professional interpreters or do without, while facing walls covered with FBI posters, warning of felony prosecutions for misstatements.

EOUST has failed miserably for years in implementing reform. The case just mentioned by Judge Cristol is one of the most egregious examples, with EOUST attorneys having been dispatched from Washington to Miami, vowing to fight for as long as it took to have a Creole speaking debtor denied bankruptcy protection because EOUST created and manages a credit counseling system that is poorly equipped to assist debtors that don't speak English well.

EOUST practices have made filing bankruptcy more expensive, more difficult and more traumatic than it already was for consumers. They have to manage documents from debtors that exceed requirements set by law and the rules, with no consideration of the

costs and benefits and ignoring the relevancy of the documents in a particular case.

One example of many in my written testimony, a single mother, domestic violence survivor, with two kids, two little kids, no child support, below median income, received a demand to produce proof within 11 days of all of her credit card purchases, without any restriction in time for how far back the documents had to go.

Many routine demands by USTs are nothing more than anti-debtor harassment. Pay stubs have been demanded of debtors who filed papers saying that they were unemployed. One UST faulted a debtor for listing herself as single, rather than divorced, when asked her marital status and demanded that she amend her paperwork.

A U.S. Trustee moved to dismiss a case after the debtor erroneously took a debtor education course instead of a credit counseling course, even though she later took the credit counseling course a day later than she was required to.

UST personnel are now being sent to routine meetings of creditors run by panel trustees, apparently, to protect creditors' interests, even though the creditors themselves generally do not waste their time attending these meetings.

A UST attorney in Pennsylvania so harshly questioned an elderly African-American debtor about her circumstances leading to bankruptcy that she actually wet herself at the meeting.

Auditors are filing documents alleging material misstatements, which neither will have no bearing on the case, other than cause trouble for the debtor.

We brought these issues to the attention of the executive office of the U.S. Trustees for years, with no results apparent beyond delay and silence. Today, it is our hope that the U.S. Trustee Program can be urged to move toward policies that are fair, reasonable and rational.

Thank you.

[The prepared statement of Mr. Uyehara follows:]

PREPARED STATEMENT OF PAUL M. UYEHARA

TESTIMONY OF

PAUL M. UYEHARA

SENIOR ATTORNEY,
LANGUAGE ACCESS PROJECT
COMMUNITY LEGAL SERVICES OF PHILADELPHIA

MEMBER,
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS (NACBA)

"United States Trustee Program:
Watch Dog or Attack Dog?"

Hearing before the
Subcommittee on Administrative and Commercial Law
House of Representatives Judiciary Committee

October 2, 2007

Chairwoman Sánchez, Ranking Member Cannon and Members of the Subcommittee, thank you for the opportunity to appear before you today.

My name is Paul Uyehara and I am a senior attorney with Community Legal Services of Philadelphia. I have handled consumer bankruptcy cases for the past fifteen years at CLS, Philadelphia Legal Assistance and the Consumer Bankruptcy Assistance Project. Since 2000, I have worked in the CLS Language Access Project, where I focus my work on advocacy for clients with limited English proficiency (LEP), while maintaining a reduced bankruptcy caseload. Today I also am testifying on behalf of the National Association of Consumer Bankruptcy Attorneys (NACBA). NACBA's 2700 members represent a large proportion of the lawyers who file bankruptcy cases in the United States Bankruptcy Courts.

My testimony is divided into two parts. Drawing upon the collective experience of NACBA's members, I first will detail the problems consumer lawyers have encountered with the United States Trustee program. Secondly, I will discuss particular failings of the Executive Office for US Trustees in addressing language-based discrimination in the bankruptcy system.

Making Bankruptcy More Difficult and Costly for Consumer Debtors

For a number of years, NACBA has voiced concern about the direction of the United States Trustee ("UST") program under this administration. The program was intended to be a neutral administrator and monitor of the bankruptcy system. Independent regional United States trustees were modeled on the U.S. Attorney system, with the expectation that these appointees would exercise independent judgment in carrying out their duties.

Unfortunately, developments in the United States Trustee program in recent years have

mirrored those that occurred with respect to U.S. Attorneys. The program appears to have been redirected to serve the political purposes of the administration, and of its close allies in the financial services industry. Instead of focusing on making the bankruptcy system work better, it has expended resources in ways that have increased the cost of bankruptcy and placed great burdens on families already stressed by job loss, medical problems, divorce, or often a combination of these.

Instead of acting as a neutral player in the system, the UST program has focused solely on ferreting out alleged abuses by debtors, seeming to presume every debtor is dishonest, while doing nothing about readily apparent abuses by creditors and their attorneys. It has touted as its greatest achievements the amounts of debt it has prevented from being discharged, even though almost none of that debt was rendered collectible as a result. And those U.S Trustees who have not been zealous enough in carrying out the directives from Washington have been forced out or are not being reappointed.

The principal results of the United States Trustees' efforts have been to deny a financial fresh start to families who desperately need it by further increasing the costs of bankruptcy and attempting to make consumer bankruptcy a minefield of "gotcha" traps to trip up unsophisticated debtors, especially those without lawyers. This has occurred through the numerous burdensome document requests made of debtors, above and beyond the fifty to seventy pages of documents that must be filed in every case. It has occurred through motions or demands for changes in filed documents based on insignificant alleged defects or errors by debtors. It has occurred through aggressive and wasteful questioning of debtors at creditors' meetings. It has occurred through numerous trustee's motions to dismiss cases for minor alleged errors or defects.

And all of these actions have forced consumer bankruptcy lawyers to constantly look over

their shoulders and spend inordinate amounts of time trying to prevent any possible entry of data that might trigger UST action and cause much greater expense and delay in a case. For example, the six page means test form, much more complicated than a Form 1040 tax return, can take hours to complete. The attorney must calculate the income a debtor has received over the preceding six months, and actual average monthly expenses for a variety of items. In most cases, the result is that the debtor is hundreds or thousands of dollars under the threshold of disposable income that would trigger a presumption of abuse. Rather than this cumbersome and unnecessary process, in cases where the debtor is nowhere close to the amounts where it would make a difference, an attorney ought to be able to make reasonable and defensible estimates of some of these figures without necessarily looking at every utility bill, every paycheck, every medical bill, every telephone bill, every charitable contribution, every school expense, and every other item that must be tabulated in the means test. If the results are a few dollars off, it is just not going to make any difference.

But many, probably most, attorneys feel they must go through all of these documents because they are afraid of allegations of malfeasance that could be made by the United States trustee. As discussed in my testimony below, some UST's regularly request attorneys to provide documentation far and above what the statute or the rules require, which could be used to make these kinds of accusations, even if it makes no difference in the outcome of the case. And auditors employed by the UST demand even more documents, which can result in publicly filed accusations that debtors have made material misstatements, even if the alleged errors (which often are not even errors at all) would make no difference in any outcome of the case. Naturally, requiring this extraordinary and unnecessary degree of precision in preparing all of the papers raises costs dramatically. Along with the already considerable additional paperwork required by the 2005 law, such requirements have

made it impossible to handle bankruptcy for the modest fees, affordable to most financially troubled families, that prevailed before 2005. And *pro bono* programs have also suffered, finding it much harder to recruit volunteer attorneys willing to undertake the increased burdens and risks involved.

Burdensome Document Requests

It seems clear that United States trustees have been directed to make many more burdensome document requests of debtors under the new law. Compliance with these requests, above and beyond the numerous documents required in every case, can take hours of attorney time and even more time for their clients who usually must gather the documents from a variety of places. The United States trustee, to our knowledge, has done no cost/benefit analysis of these requests, which rarely turn up information significant enough to affect the outcome of a case. Indeed, there is no indication that the UST program has given any consideration at all to the burdens it imposes on a debtor when it takes only 30 seconds for the UST to send a form document request.

Moreover, most of these requests have come before the meeting of creditors, where the debtor can be questioned by the private trustee, and at which it would have become apparent that they were inappropriate. In New York, for example, we have had reports that the UST has instructed trustees to refuse to complete the processing of case for any above-median debtors if they do not provide two years worth of tax returns and six months of paystubs, far more than the law requires, and more than is necessary in most cases to determine whether any abuse could be alleged.

Here are a few examples of such requests:

- California - Although the 72 and 75 year old debtors were in extremely poor health, the UST demanded all credit card statements for four accounts, as well as all invoices, for 12

months, and an explanation of "what happened to [all] the merchandise purchased with the debts," since the inception of any of the debts. (See Exhibit A)

- Pennsylvania - Numerous credit account documents were requested from an 84 year old man, living only on social security and a pension annuity of $72 per month, with no assets, seeking to discharge debts mostly incurred by his late wife.
- Connecticut - A disabled client was asked for all credit card statements for two years on nine accounts, all applications for any kind of benefits and statements regarding benefits for 12 month period, all insurance policies for a three year period, and numerous other documents. (Exhibit B)
- New Jersey - A single mother, hearing impaired survivor of domestic violence left with two young children and no child support, a below median income debtor, was asked to provide within 11 days "any and all documentation of credit card purchases" with no time limitation on how far back this documentation should go.
- Pennsylvania - A request for 12 months of credit card statements from an 80 year old man who lives with his children and whose only income is social security.
- Minnesota - attorneys report that they receive a document request like this in every case where the debtor is above median income. (Exhibit C)
- California - A debtor who was run over by a bus, was in a coma for 30 days, and lost his job and his medical benefits, was asked for more documentation.

It is obvious that in many of these cases, the UST did not even bother to think, or check any of the facts, before sending the letter requesting additional documentation. Instead, United States trustee personnel at this time appear to be operating under a contrary directive to make the process as

burdensome as possible in virtually each and every case. Why shouldn't they, if they are under pressure to send more of these letters and it takes so little time to add the debtor's name and case number to a form letter?

In addition to all of these document requests by the United States trustees, private trustees in some districts send similar burdensome document requests, and we believe they are encouraged to do so by the UST program. Attached is a letter (Exhibit D) sent to a couple where both were disabled, and one was in a nursing home. Because the Director of the United States Trustee Program had asked NACBA to report inappropriate conduct to the United States trustees, NACBA wrote to the United States Trustee, who supervises this trustee, regarding the burdensomeness of such requests. We recently received a response to our letter from the Director of the Executive Office of the United States Trustees, in which he does not seem to find anything troubling about the contents of the document request or about such document requests being sent routinely by trustees, although he did offer to discuss the issue further.

Insignificant or Nonexistent Filing Defects

Another persistent problem is UST nitpicking about supposed defects in the papers, which are usually not even mistakes. For example, we have had inquiries about paystubs for a debtor who stated on her schedules she was unemployed, but in any event whose income was obviously so low there could be no conceivable possibility of sufficient income to pay creditors. Other attorneys have reported dealings with the UST about a paystub that supposedly was not filed (but was) for a debtor with a biweekly gross income of $220. Another lawyer reported a UST demanding that a debtor who had been divorced for 10 years state on her schedules that she was "divorced" rather than "single"

when the question simply asks for "marital status".

Similarly, the UST has aggressively sought dismissal of cases for such minor defects or for minor issues with respect to the credit counseling requirements. Here are some reported examples:

- *In re Ruckdaschel*, 364 B.R. 724 (Bankr. D.Id. 2007) - The debtors received counseling 187 days before the petition and actually attempted a credit counseling plan, in which they paid over $7,000 to creditors, as a result of the counseling. The petition would have been filed within the 180 days but the husband debtor had been incarcerated and the filing was delayed by prison mail The UST moved to dismiss and the case was dismissed.
- *In re Clippard*, 365 B.R. 131 (W.D.Tenn. 2007) - A *pro se* debtor sought a deferral of her credit counseling and obtained it after she filed her case. The bankruptcy court found the debtor had substantially complied with the requirement and denied the UST's motion to dismiss her case. The UST appealed the decision and succeeded in having the *pro se* debtor's case dismissed.
- *In re Kernan*, 358 B.R. 537 (Bankr.D.Conn. 2007) - The debtor contacted one of the credit counseling agencies on the UST web site, but the counseling she obtained was not the correct special pre-bankruptcy counseling. When she learned of this, she obtained the correct briefing one day after her case was filed. Agreeing that these facts were accurate, the UST nonetheless filed a motion to dismiss the case. The court denied the motion and found that the motion was neither warranted nor mandated.

Wasteful and Redundant Attendance of UST Personnel at Creditors' Meetings

Yet another problem is the newly frequent appearances of UST personnel at meetings of

creditors, where a panel trustee is already present and capable of asking all necessary questions. Although, by its very definition, the meeting is designed for creditors to ask any questions they have, the UST seems to feel it must represent the interests of creditors even if they do not bother to attend. And why should creditors show up if they have the U.S. Justice Department there to represent them?

Nonattorney UST "analysts" now regularly appear to ask questions, often misguided or irrelevant, and there have been many instances of inappropriate comments or questioning by UST personnel, for example, asking a wheelchair bound debtor, who was on social security disability - "How do I know you are disabled?" Clients are brought to tears, and asked questions like "why they don't brown bag it" or why their expenses increase when they are working. A 69 year old woman with five stents in her heart was asked if she had a note from her doctor, and why she was planning to stop working. In one well-known Pennsylvania incident, a UST attorney grilled an elderly African-American woman so mercilessly that she, humiliatingly, lost control of her bladder.

More than a few people who have observed the UST program have suggested to us that such actions result from the fact that they are overstaffed, in light of the decreased number of bankruptcy cases, and do not have enough to do, especially because they appear to have hired a large number of new nonattorney "bankruptcy analysts' in the last few years. As discussed below, we believe there is a lot the UST could be doing to police actions of creditors, but for the tasks they have chosen to take on, which appear to focus only on debtors in consumer cases, there is undoubtedly validity in the notion that if they have time to do all of the things they are doing they are indeed overstaffed.

Problems with Audits Under United States Trustee Supervision

There are numerous problems that have arisen in the audit program instituted by the UST to

carry out the new audit provisions of the 2005 law. The auditors make burdensome document requests in every case, with no apparent consideration of the costs to debtors to comply. They sometimes accuse debtors, in public filings, of material misstatements when no misstatements have been made, or when the alleged misstatement was not material because it could have had no impact on the case. In some of these cases, the accusations are based on misunderstandings of bankruptcy law. But there is no review by the UST before these public accusations are made. In fact, the UST will not even disclose the directions it has given to auditors regarding what constitutes a material misstatement.

Sometimes auditors seem to not only misunderstand the law, but assume their view of the law is the only possible view. We have heard of a number of cases where auditors found material misstatements because income on the means test form (a six month backward-looking average) did not match the income on Schedule I (the current income). Debtors have been reported to have made material misstatements based on auditors' own misstatements of what was in the debtors' schedules.

For example, an auditor in state of Washington claimed a material misstatement, based on a differing interpretation of how to complete schedules. The UST demanded that the debtor amend the schedules, even though it would have had no substantive impact on the case in any event, and even filed a motion to compel the amendment. The court ruled that there was no need for the debtor to amend.

In one audit of a debtor in Minnesota the debtors listed as assets: BUSINESS EQUIPMENT INCLUDING COMPUTER, MONITOR, PRINTER, KEYBOARD, FAX, FLORAL SHOP SUPPLIES, FLORAL SHOP LIVE INVENTORY, FLORAL SHOP EQUIPMENT IN DEBTORS' POSSESSION. An audit found a material misstatement because these items were not listed on the

line of the schedules for Inventory, but instead on the line for Machinery, fixtures, and supplies used in business.

The important point for this Committee is that when the UST comes forward with some large percentage of cases that supposedly had material misstatements, as they will undoubtedly do, perhaps in seeking more funding, those numbers are meaningless because the process is so flawed. The real question is in how many of those cases did the court dismiss the case or deny a discharge because of the alleged material misstatement. From what we are hearing, in the vast majority of cases where a supposed material misstatement was found this has not happened because in fact there was no misstatement or it was not really material.

Overly Aggressive Litigation Tactics

Another common problem is the filing by the UST of a motion to dismiss for abuse, which requires many hours of work to defend, followed by the withdrawal of the motion at the last minute. An example is described in the attached letter from a Minnesota attorney who was required to devote 25 hours of uncompensated work to a motion filed against a single woman who worked full time as a patient attendant and in addition worked part-time cleaning offices to make ends meet. (Exhibit E) When the time for trial came, the motion was abruptly withdrawn.

In another Minnesota case involving a debtor couple in which the wife had had a major stroke, greatly reducing their income, the UST argued that her prognosis was good and the case did not present special circumstances because she might be able to return to work nine months later.

One more example of poor exercise of judgment by the UST in litigation strategy is explained below.

Failure to Police Abuses by Creditors and their Attorneys

NACBA has previously raised with this Committee the failure of the UST to do anything about pervasive abuses by creditors and has complained to the UST about this failure for years. Courts have found creditors regularly filing false proofs of claim, and even bogus affidavits in connections with motions for relief from stay, types of fraud that have caused many families to lose their homes. Our experience is that these abuses occur daily, and have occurred for years, with no action by the UST program. Had debtors' attorneys committed such actions even once, the UST would undoubtedly have sought harsh sanctions.

We understand that the UST program is now saying it will begin taking action on some of these problems, but what they will do remains to be seen. We hope that they will not just bring one or two highly publicized cases for the sake of saying they are doing something. So far, they have mainly participated in actions initiated by others, and in at least one case it appeared that they took the side of the mortgage company that had committed the abuses. In *In re Rivera*, 369 B.R. 193 (Bankr.D.N.J. 2007) the court, on its own initiative, discovered massive filing of false documents by a law firm representing mortgage companies. A mortgage company appealed the bankruptcy court's order sanctioning it. Then, the UST, which had not initiated the case, entered into a stipulation, apparently on orders from Washington, vacating "any and all injunctions" entered by the bankruptcy court, even though the local UST had previously stated that injunctive relief was "a given" in the case.

Language Access – Section 341 Meetings of Creditors

In March 2003, I filed a civil rights complaint against the UST in Philadelphia on behalf of a

limited English proficient (LEP) debtor and the Consumer Bankruptcy Assistance Project after he refused to provide the debtor with a Cambodian interpreter for her meeting of creditors (a copy of the complaint is attached as Exhibit F). At that time, I had been surprised to learn it was the policy of EOUST not to provide interpreters for LEP debtors, since that policy existed in violation of Executive Order 13166, 65 Fed. Reg. 50121 (August 16, 2000), which requires federal agencies to ensure that LEP persons have meaningful access to federal programs and services. Indeed, it became apparent at that point that DOJ had erred in issuing its Departmental Plan Implementing Executive Order 13166 by mischaracterizing EOUST as a management component which would rarely have contact with LEP persons.

In response to the complaint, EOUST issued a Language Assistance Plan (Exhibit G) on August 31, 2004 in which it acknowledged that it had been re-classified as a component which, through the local UST offices, provided services and might interact with significant LEP populations. The plan called for an LEP Pilot Project in seven UST offices, including the Southern District of Florida and the Eastern District of Pennsylvania, each of which would implement a language access plan, after which EOUST would review, revise and implement a plan nationally starting in September 2006. By September 2007, EOUST was required to have filed a progress report with the Civil Rights Division on the national implementation of the plan. The plan called for UST's to provide competent interpreters for LEP debtors at 341 meetings, to have language services available in UST offices, and to translate important documents such as the bankruptcy information sheets distributed to debtors at the meeting of creditors.

Although the plan is simple, seemingly easy to implement and contained generous deadlines, EOUST has failed miserably in executing the plan. It is over a year behind in transitioning from the

pilot program to the national one. It has not changed its published handbooks for trustees which contain incorrect statements of policy on UST responsibility to provide language access. Six of the seven pilot districts had no information readily available on their websites about the availability of interpreters. There has been some backsliding in at least one pilot location – Miami – where the UST is issuing notices to all debtors that it is not providing translation services, posted notices about the pilot program were removed, and a private interpreter is attending meetings to hire himself out to Spanish speaking debtors. This continued state of affairs was been brought to the attention of Clifford White personally in June at a meeting I attended together with NACBA national president Henry J. Sommer.

EOUST is continuing to engage in national origin discrimination by placing LEP debtors at a disadvantage in the bankruptcy system based upon their English language ability, despite the fact that its pilot program long ago demonstrated such discrimination could be easily remedied. These practices are contrary to EO 13166, the DOJ Plan, and the EOUST plan and should be terminated without further delay. In the absence of aggressive and good faith remediation by EOUST, Congress should consider amendments to the law to impose standards on the bankruptcy system.

Language Access to Bankruptcy Counseling

EOUST has compounded its errors regarding treatment of LEP debtors in the past three years as it created and supervised the system to provide pre-bankruptcy credit counseling and pre-discharge debtor education courses mandated by bankruptcy reform legislation. It has not complied with the requirements set by Congress in Sections 109 and 111 of the Bankruptcy Code. It failed to thoroughly review agency qualifications, force providers to adhere strictly to applicable standards,

ensure the counselors were qualified and trained, review materials and lesson plans for efficacy and, as a result, it failed to ensure that adequate counseling would be made available to LEP debtors. It appears to have done so consciously, ignoring complaints from consumer advocates and acting as if it had learned nothing from its experience with the complaint regarding language access for meetings of creditors. Most egregiously, EOUST has attacked debtors who were unable to obtain bankruptcy counseling as a result of EOUST's erroneous policy.

EOUST devised standards for approval of the non-profit credit counseling and financial management agencies, including extremely detailed application, bonding and certification forms. It reviewed the applications and approved a host of agencies to provide educational services to debtors. Throughout the process, EOUST ignored the importance of language in the determining agency qualifications to provide effective teaching to debtors. Despite the mandate that agencies have qualified counselors and provide adequate counseling, it set no requirements for reporting the language capacity of the staff, while it did ask detailed questions about the educational background, certifications, experience and criminal record of each credit counselor. Financial management agencies were required to certify compliance with the Americans with Disabilities Act, availability of parking and public transportation access, building codes and insurance at all physical teaching locations, but were not asked to certify compliance with federal language access standards.

The resulting system, as designed and managed by the EOUST, contained numerous foreseeable language barriers to the bankruptcy education programs, because the approved agencies had little or no language capacity, generally were not required to advertise what multi-lingual capacity was available and had not translated required reading materials. For a long period of time, EOUST did not release to the public what little information it had gathered about language capacity,

leaving debtors and their lawyers to tediously contact agencies one by one till they found one that could offer language appropriate services. Debtors without lawyers were faced with the additional problem of having to gather this information from providers unable to converse with them in their language. Lawyers who sought assistance from UST staff in overcoming language barriers created by EOUST policy were offered no assistance but were guaranteed a fight if their clients failed to strictly comply with the new counseling requirements. In violation of federal policy, UST staff and counseling agencies often advised debtors and their lawyers to bring a relative or friend to provide interpreting or translation help in order to complete the counseling sessions in English.

The net result of the mismanagement of the debtor education programs by EOUST is that LEP debtors were faced with a federally sanctioned language barrier. This barrier can delay, restrict or bar LEP debtors from filing bankruptcy or obtaining a discharge, and can subject them to reliance upon others to participate in counseling or to the absurdity of sitting through classes which they cannot comprehend and the dangers of debt management plans or other outcomes premised on faulty understanding of financial information from the debtor or advice from the counselor.

These errors were brought to the attention of EOUST by consumer advocates as early as the summer of 2005 before the counseling requirements went into effect, yet EOUST did nothing to change course. In May 2006, my office and 36 other advocacy, consumer and ethnic organizations including NACBA complained in writing to Director White about the problem and made specific recommendations to correct it (Exhibit H). We received no response to the letter. In September 2006, I filed comments on EOUST's proposed rule on application and approval procedures for counseling agencies which included detailed changes to ensure that the agencies complied with federal language access policy (Exhibit I). I received no response to the comment and the rule has

not been finalized.

During this period, I learned from a legal services colleague of the plight of Jean Raoul Petit-Louis, a Creole speaking debtor in Miami whose lawyer was unable to find a single credit counseling agency that could provide a pre-bankruptcy session in the one language he could comprehend. His lawyer sought assistance from the UST, who had no useful suggestions and knew of no agency that could provide counseling effectively. Left with no alternatives and needing to file a bankruptcy petition immediately to avoid his eviction, Mr. Petit-Louis' lawyer filed the petition and noted on it that her client could not find a counseling provider.

When the matter came before Bankruptcy Judge Cristol, he quite rationally determined that the debtor had to be permitted to proceed without counseling since it was undisputed that no counseling was accessible to him. Remarkably, the UST fought the judge's decision as if the integrity of the bankruptcy system depending on getting it overruled. Lawyers were dispatched from Washington to Miami from EOUST to take over the fight against the debtor. When Judge Cristol properly denied reconsideration, they appealed and vowed to persist until they won, determined to deny the debtor a discharge and ultimately forcing him to abandon his bankruptcy case. The shameless government lawyers never acknowledged that EOUST was at fault for the lack of language accessible counseling and that their position in court – that the debtor was at responsible for the errors of the government – was itself a violation of federal policy.

Finally, by the time NACBA met with Director White in June 2007, EOUST was at least making available information about which agencies could provide counseling classes in what languages. Yet is apparent that consumer choice continues to be severely limited for those who don't speak English or Spanish. In Maryland, English speakers can choose from 54 debtor education

providers, while those who speak, for example, Korean, have a choice of two providers. The language information is presented on the website in a cumbersome and misleading manner. The FAQ posted there continues to suggest that debtors use friends or relatives to interpret, in violation of federal standards and providers are doing little to let the public know of the availability of second language instruction. Ongoing problems were detailed in a letter in August to Mr. White (Exhibit J).

It remains essential for EOUST to change course on management of the counseling system by recognizing that it must require the counseling agencies to increase language capacity and to devise plans to provide services effectively to LEP debtors. At the same time, UST staff should be required to assist debtors who have difficulty locating counseling and, in the event that services are not readily available, they should assist debtors in securing a waiver rather than attacking them.

Conclusion

I must emphasize that these issues are not new. NACBA has attempted over the years to bring these problems to the attention of the agency with no meaningful results. For years, we were told that they did not want to get involved in abuses by mortgage companies because they were "two party disputes." When we complained about particular UST actions, we were told they were only "anecdotal evidence". When we have asked the UST to comply with the Justice Department's own policy on language access, the program has stalled and dragged its feet.

Now, with the winds of change prevailing in Congress, the program is apparently attempting to at least appear more responsive. This Committee should demand concrete action to change the unfair and unbalanced approach of the UST in consumer bankruptcy cases. Like the U.S. Attorneys, the United States Trustee program should be above politics. There is strong evidence that this has

not been the case under this administration.

I appreciate the opportunity to present this testimony to the committee. We are available to you and your staff to further discuss these important issues and how to correct the problems we have highlighted. Thank you for listening.

U. S. Department of Justice

Office of the United States Trustee

Northern and Eastern
Districts of California and Nevada

280 South First Street, Room 268
San Jose, CA 95113
Telephone: (408) 535-5525
FAX: (408) 535-5532

May 4, 2007

Norma L. Hammes, Esq.
Gold & Hammes
1570 The Alameda, Suite 223
San Jose, CA 95126

Re: [redacted]

Dear Norma:

Review by the United States Trustee of the Schedules and Statement of Financial Affairs for the above-referenced Chapter 7 case has raised some concerns about the debts your clients have incurred in comparison with the scheduled assets.

Schedule F shows $127,306 in unsecured debt, based primarily on credit card obligations. **Please explain what happened to the merchandise purchased with the debt.**

In addition, please provide me with copies of the following invoices and credit card statements for the twelve month period prior to the bankruptcy filing:

Bank of America	**($27,000)**
Chase	**($16,000)**
Citibank	**($20,000)**
Washington Mutual	**($15,000)**

Please also provide me with a copy of the debtors' current credit report(s), if available.

The meeting of creditors in this case is scheduled for May 24, 2007 at 1:30 p.m. Please respond to this letter and provide the requested documentation by no later than **May 21, 2007**. Thank you for your cooperation.

Very truly yours,

John S. Wesolowski
Attorney for United States Trustee

cc: Suzanne Decker, Chapter 7 Trustee

RECEIVED
MAY 07 2007
BY:----------

EXHIBIT A

GOLD and HAMMES, Attorneys
1570 The Alameda, Suite 223
San Jose, California 95126
(408) 297-8750

May 7, 2007

John Wesolowski, Esq.
Office of the U.S. Trustee
280 S First St #268
San Jose CA 95113

Re: [redacted]

Dear Mr. Wesolowski:

This letter is in response to your request for invoices and credit card statements.

While I imagine, with significant effort on the part of my clients and me, I might be able to get some of the information you request, I wish to share some information about the debtors which hopefully will cause you to withdraw your request.

My clients are 72 and 75 years old, with most of their income being Social Security benefits. Their health is extremely poor. The husband has been in the hospital I believe more than once in the last six months with one stay resulting in subsequent time spent in a convalescent home. The wife is struggling to deal with her own poor health as well as her husband's. It was very difficult for them to make it in to my office to prepare and sign papers for their bankruptcy.

With regard to their credit card bills, Mr. and Mrs. [redacted] have had significant balances on them for quite a few years. Like so many of my clients, they have always hoped for that "miracle" that would allow their debts to be paid off. That miracle did not come.

Yes, we could probably force them to get the assistance of their children to sort through old financial records – if they have them – to find sales slips for items which were purchased probably five or ten years ago. And, if you were to trace the current balances back to the actual purchases, you and we would probably find that of the $27,000 owed to Bank of America, for example, the purchase prices probably total only $5,000 or so. Very likely there have been balance transfers made in an attempt to keep interest rates low which ultimately resulted in much higher interest and additional fees.

Mr. and Mrs. [redacted], like most of my clients, have been treated and cheated mercilessly by the credit card companies. Will the U.S. Trustee's Office or any other federal agency take any action against the usurious interest and abusive collection practices by the credit card companies? Of course not. That's the way our federal government is these days – abuse the helpless and reward their corporate abusers.

These clients, like virtually all of my clients, tried everything they knew of to avoid filing bankruptcy. Does it really make any sense to punish them further by scaring them into having nightmares about going to jail? They've already had those nightmares. What do you and the U.S. Trustee's Office expect to get out of this demand for documents?

Let me know if you still believe you need the requested items.

Sincerely,

GOLD and HAMMES

Norma Hammes

Norma Hammes

c: Suzanne Decker, Trustee

U.S. Department of Justice

Office of the United States Trustee
District of Connecticut

One Century Tower
265 Church Street, Suite 1103
New Haven, Connecticut 06510-7016

(203) 773-2210
Fax: (203) 773-2217

July 3, 2007

VIA FACSIMILE AND U.S. MAIL

Christopher Carrozzella
130 North Main Street
P.O. Box 37
Wallingford, CT 06492-0037

Re: [redacted]

Dear Attorney Carrozzella:

As part of the United States Trustee's Civil Enforcement Initiative, we are conducting an independent review of all chapter 7 filings. This case is being examined for a potential motion seeking dismissal pursuant to 11 U.S.C.§ 707 and for the filing of a complaint objecting to discharge under 11 U.S.C. § 727(a). In order for us to complete our examination and determine whether further action is appropriate, we request that you provide us with the following documents:

1. All statements for financial accounts held by the Debtor for the two-year period preceding the filing of the bankruptcy petition including, but not limited to, checking, savings, certificates of deposit, securities, retirement, investment, and credit union accounts.
2. Credit card statements (bills) for the two-year period prior to the filing of the bankruptcy petition for the following creditors:

a. Advanta Bank Corp. Account no. [redacted]
b. Bank of America Account no. [redacted]
c. Bank of America Account no. [redacted]
d. Bank of America Account no. [redacted]
e. BankCard Services Account no. [redacted]
f. Chase Account no. [redacted]
g. Chase Account no. [redacted]
h. Chase Account no. [redacted]
i. MBNA America Account no. [redacted]

3. All insurance policies and riders thereto under which the Debtor is an insured for the period

EXHIBIT B

beginning three years prior to the filing of the bankruptcy petition through the present date including, but not limited to, homeowner, renter, life, motor vehicles, marine equipment, equine, jewelry, art, and collectibles.

4. All applications for benefits and statements regarding benefits received within the twelve-month period prior to the filing of the bankruptcy petition through the present date including, but not limited to, retirement, disability, unemployment, or worker's compensation.

5. If the Debtor is divorced or legally separated, copies of the decree of divorce or separation, financial affidavits, and any and all documents relating to court approved alimony (maintenance), child support and property settlement.

6. Statements reflecting any gaming or gambling activity, including winnings and losses, for the two years prior to the filing of the bankruptcy petition.

7. A copy of the Debtor's credit report.

8. Please identify and explain [redacted]'s relationship to the Debtor. Please also identify the property for which the Debtor is obligated to Wells Fargo Home Mortgage as stated on Schedule H, and provide documentation of the Debtor's obligation of the debt, as well as documentation of the current amount of the debt.

9. If applicable, an explanation in writing detailing the extraordinary circumstances which precipitated the filing of the petition.

Please provide these items on or before **July 23, 2007.**

Thank you in advance for your anticipated cooperation.

Very truly yours,

Sharon Warner

Sharon Warner
Paralegal Specialist

cc: B. Amon James
Ronald I. Chorches

U.S. Department of Justice

Office of the United States Trustee

Districts of Minnesota, Northern Iowa, Southern Iowa, North Dakota and South Dakota

Regional Headquarters
Law Building, Suite 400
225 2nd Street SE *(319) 364-2211*
Cedar Rapids, IA 52401-1400 *Fax (319) 364-7370*

April 12, 2007

Janet Hong
101 2nd St. SE, Suite 600
PO Box 1307
Cedar Rapids, IA 52406-1307

Re: [redacted]

Dear Ms. Hong:

I am reviewing the bankruptcy schedules and Statement of Current Monthly Income and Means Test Calculation filed by the above debtor(s) for accuracy and repayment potential under11 U.S.C. §707(b).

Please provide copies of the following documents regarding this bankruptcy estate so that I may complete the review:

1. Copies of debtor(s)' pay stubs for the **7 months** prior to filing.

2. The debtor(s)' previous two years federal and state income tax returns, including all supporting schedules, W-2's and 1099's.

3. The current declarations sheet for home owners insurance with copies of all scheduled assets and riders, life insurance (except through employer) and auto insurance.

4. A statement showing the origination date, term, amount, interest rate and current balance on any loans against the debtors' 401(k), if applicable.

5. If the debtors' have a dependant for which they are paying/receiving support, provide a copy of the Order for Support.

6. A payment coupon or statement showing the amount of the house payment or rent.

EXHIBIT C

5. Provide a payment coupon or statement showing the amount owing and number of payments remaining on all secured debt. Collins CU
Wells Fargo

If the debtor(s) have business debts or business income, please:

1. Identify all business debts on Schedules D, E and F.

2. Provide an itemization of any business expenses which are included on Schedule J, and 4b or 5b of Form B22.

If the debtor(s) have claimed expenses on Form B22 for the following, please provide:

1. If the debtor has expenses for education for employment or for a physically or mentally challenged child, provide documentation for those expenses.

2. If the debtor has expenses for childcare, provide documentation for those expenses.

3. If the debtor has expenses for telecommunication services, provide documentation for those expenses.

4. If the debtor has expenses for contributions to the care of household or family members over 18 years of age, provide documentation for those expenses and an explanation of why those expenses are necessary.

5. If the debtor has expenses for home energy costs in excess of the IRS allowance, provide documentation for those expenses.

6. If the debtor has education expenses for dependent children under 18, provide documentation for those expenses.

7. If the debtor has expenses for additional food and clothing above the IRS allowance, provide documentation for those expenses.

8. If the debtor has expenses for continued charitable contributions, provide documentation for those expenses.

Please advise of any extenuating circumstances which this office should take into account when reviewing this case under §707(b). If possible, provide evidence of the extenuating circumstances, such as doctor's statements, notification of job termination, etc.

Please submit your response, the requested documentation and file any necessary amendments by April 26, 2007. Please do not submit originals. All documents will be shredded when this office has completed its review. Thank you for your assistance with this matter.

Sincerely,

HABBO G. FOKKENA
UNITED STATES TRUSTEE

By: _____
Jennifer L. Cline
Paralegal Specialist

National Association of Consumer Bankruptcy Attorneys

Please respond to:
7118 McCallum Street
Philadelphia, PA 19119
215-242-8639
henry@henrysommer.com

HABBO G. FOKKENA
UNITED STATES TRUSTEE (REGION 12)
225 SECOND STREET, SE, SUITE 400
CEDAR RAPIDS, IA 52401

Re: Burdensome trustee document requests

Dear Mr. Fokkena:

I am writing to convey concern about burdensome document requests by a trustee under your supervision. Enclosed is one of those requests, which was made in a case where the debtors are both disabled and living on social security. The husband is in a nursing home and the wife is an amputee. I understand that much of their debt was incurred to pay medical expenses. The request was made before the meeting of creditors, at which the trustee could have assessed the case and learned these facts.

Blanket requests such as this one greatly increase the cost and burdensomeness of filing bankruptcy. It can take many hours of time for attorneys to gather all the information that is requested, and such information almost never has any substantive effect on a case such as this one.

It is my understanding that this particular trustee makes similar requests routinely in cases where they are not appropriate, perhaps in an attempt to curry favor with your office. You should send this trustee and others a clear message that such requests are not appropriate, and that more specifically targeted requests should be made only after a creditors meeting, where it can be determined what information, if any, could have a significant effect in a case.

As you may know, the United States trustee program, and your office in particular, have been criticized by our organization and others for needlessly adding to the costs and difficulties of filing bankruptcy cases. Please inform me whether you will be taking any remedial action to prevent such problems in the future.

Very truly yours,

Henry J. Sommer

cc: Clifford J. White, III, Director

EXHIBIT D

PATTI J. SULLIVAN
UNITED STATES CHAPTER 7 PANEL TRUSTEE
P.O. Box 16406, St. Paul, MN 55116
Telephone: (651) 699-4825
Facsimile: (651) 699-4831

August 8, 2007

AUG 10 2007

Barbara J. May, Esq.
2780 Snelling Avenue N.
Suite 102
Roseville, MN 55113

Re: [redacted]
Date of Filing: 07/31/07

Dear Ms. May:

As you know, I am the Trustee in the above matter. Please have the debtor provide me with the following information at your earliest convenience and, in any event, at least one week prior to the meeting of creditors to be held on August 28, 2007:

1. The debtors' bank account statements, along with registers or copies of cancelled checks, for the time period covering May 1, 2007 through August 15, 2007 for any and all accounts into which the debtors have deposited any monies or from which any of the debtors' bills have been paid for that time period.
2. The debtors' paycheck stubs covering the pay periods commencing two weeks prior to commencement of the bankruptcy case, and continuing through the pay period ending two weeks after commencement of the bankruptcy case.
3. Copy of the debtors' most recent year tax returns. PLEASE MAKE CERTAIN TO INCLUDE, IF APPLICABLE, A COPY OF THE PROPERTY TAX REFUND FORM.
4. If the debtors signed a mortgage in the last year, please have them provide me with a copy of that mortgage together with a copy of the settlement statement from the mortgage closing.
5. If the debtors have gone through a divorce in the last five years, please have them provide me with a copy of the decree of dissolution.
6. Copies of certificates of title for all vehicles, trailers, and boats.
7. Copy of the declaration page from the insurance policy showing that all vehicles are covered with collision and comprehensive insurance.
8. Copy of any appraisal for the debtors' home, completed in the last two years.
9. Copy of debtors' homeowner's policy with all endorsements.
10. Documents regarding liquidation of IRA's (i.e., statements reflecting withdrawals and copy of check (s) (front and back) used to pay for medical services along with invoices.

If the debtors made any payment on the home mortgage other than regular scheduled monthly payments in the last two years, please have the debtors provide a list of all such payments and the source of the monies for those payments.

The failure by the debtors to timely provide the information requested above may result in the meeting of creditors being continued. Please have the debtor mail all requested information, as our fax machine does not accept large faxes.

I enclose three copies of the tax stipulations for 2007. Please have the debtors sign all three copies and return them to me as soon as possible. Please remember that 58% of the federal refund and state income tax refunds are an asset of the estate. If the debtors receive the refund, they should not cash the check.

In addition, I hereby request that the debtor provides to me copies of their state and federal income tax returns for 2007, **including the property tax return**, as soon as they are filed. I enclose 3 stipulations for your clients' 2006 property tax refund, 100 percent of which is an asset of the estate. Please have the debtors sign all three copies and return them to me as soon as possible. If the debtors will not qualify for a property tax refund, please have them execute a statement indicating they will not qualify for a property tax refund when they provide copies of the returns.

All of the documents the debtors turn over are property of the bankruptcy Trustee. They will not be returned to the debtors. They will be destroyed two years after the debtors' bankruptcy case is closed unless the debtors make prior arrangements to pick them up from the Trustee's office. Be sure to make copies of any documents the debtors require **before** the debtors turn them over to me. Thank you for your consideration in this matter.

If you have any questions regarding this matter, please feel free to contact me.

Very truly yours,

Patti J. Sullivan
Trustee in Bankruptcy

PJS:idc

cc: [redacted]
South St. Paul, MN 55075

IAN TRAQUAIR BALL
ATTORNEY AT LAW
12 SOUTH SIXTH STREET, SUITE 326
MINNEAPOLIS, MINNESOTA 55402
612/338-1313

February 11, 2007

Michael Ridgeway
Trial Attorney
Office of the U. S. Trustee
1015 United States Courthouse
300 fourth Fourth Street
Minneapolis, MN 55402

Dear Mr. Ridgeway:

I note that your are scheduled to speak at the MSBA Bankruptcy Law Section meeting on February 20, 2007 on miscellaneous Means Test issues in Chapter 7 bankruptcy proceedings. I hope you will have time to address a concern of attorneys who represent consumer debtors about the way in which the U. S. Trustee's office is conducting its adversarial proceedings regarding §707(b) objections so far.

My own concern is based on my recent experience in a Chapter 7 case, [redacted], in which the U. S. Trustee objected to my inclusion of a homeowner association monthly assessment as part of the monthly secured debt expense listed in paragraph 42 of Form B22A. Omitting this expense would cause the debtor to be ineligible for Chapter 7 relief. The U. S. Trustee filed the requisite notice of presumption abuse, I filed a response in behalf of the debtor, and a hearing was scheduled before Judge Dreher. Although no discovery was ordered by the judge because the matter appeared to be purely a matter of law, I nevertheless obtained copies of the debtor's mortgage agreements, the homeowner association declaration, and association by-laws and made those documents available to the U. S. Trustee. I also provided the U. S. Trustee, at its request, with additional information regarding the association's monthly and annual expenditures. I met with my client in St. Cloud twice besides several phone conferences and I met with the U. S. Trustee's office on three separate occasions to make the documents available and to discuss withdrawal of its §707(b) objection. Each time I met or discussed the objection with the U. S. Trustee's office, I was advised that the U. S. Trustee intended to go forward with the objection. I then prepared a trial brief, as well as fact and exhibit stipulations, as ordered by Judge Dreher. On the afternoon of the day the trial brief and stipulations were due, I was advised by the U. S. Trustee that it had decided to withdraw its objection and that the hearing was canceled. Between the meetings with my client in St. Cloud and the meetings with the U. S. Trustee, phone conferences, case law research, and trial brief preparation, I spent a minimum of 25 hours responding to

U. S. Trustee's §707(b) objection. My client was a single woman working a full-time job as a patient attendant and a part-time job cleaning offices on weekends, living in subsidized housing, and could not possibly afford to pay me for the additional time this trial preparation required. I did it anyway because I believed she needed the representation. As it turned out, it was a complete waste of my time.

Since the [redacted] hearing was canceled, I have discovered that several other attorneys have had a similar experience with the U. S. Trustee's office: a notice of presumption of abuse is filed, a hearing is scheduled, the debtor's attorney responds, a trial order is issued, the debtor's attorney prepares the required exhibits and trial brief, and then shortly before the hearing, the U. S. Trustee withdraws its objection but does not concede the issue. The result is an unresolved issue with no direction from the bankruptcy court. Just as important, however, is the impression given that the U. S. Trustee, after filing a notice of presumption of abuse and scheduling an evidentiary hearing, is deliberately rejecting any substantive discussions with the debtor's attorney, in order to burden the debtor's attorney with the additional task of trial preparation even though the U. S. Trustee does not intend to go forward with the hearing. The effect, whether or not intended, is to discourage a debtor from contesting the U. S. Trustee because the debtor cannot afford the additional cost of representation that will not go to hearing anyway. The inability of Chapter 7 debtors to afford the extra cost, and the unwillingness of consumer bankruptcy attorneys to undertake such litigation repeatedly without compensation or adjudication, gives the U. S. Trustee an unfair advantage.

This letter is not a complaint about any of the personnel of the U. S. Trustee's office; I have great respect for every employee that I have dealt with in that office, including my experience in the [redacted] case. The letter is addressed to you because you are the U. S. Trustee representative chosen to discuss various §707(b) issues at the section meeting on February 20, 2007, and I want you to be aware of the very real concerns of the consumer debtor bankruptcy bar for the apparent disregard of the U. S. Trustee for the burdens it is deliberately or unintentionally placing on the debtor to respond to a presumption of abuse notice on the merits. I hope you will have time to comment on this issue on February 20, 2007.

Sincerely,

Ian Traquair Ball

Ian Traquair Ball

cc: Habbo Fokkena
Stephen Creasey

U.S. Department of Justice
Civil Rights Division
Coordination and Review Section

COMPLAINT FORM

1. **Complainants:**
   a. (Ms.) Huot Hoeung
   901 Emily Street, 2nd Fl.
   Philadelphia, PA 19148
   (215) 334-0537

   b. Consumer Bankruptcy Assistance Project
   1424 Chestnut Street
   Philadelphia, PA 19102
   (215-523-9511

2. **Persons subject to discrimination, if different from above:**
   a. Huot Hoeung (above)

3. **Agency or Department or Program that discriminated:**
   Agency: U.S. Department of Justice
   Component: Office of the United States Trustee
   Individual: Frederic J. Baker, Sr. Assistant U.S. Trustee
   Address: 601 Walnut Street, Rm 950 West
   Philadelphia, PA 19106
   Telephone: 215-597-4411

4A. **Non-employment form of discrimination:**

Race or Color ___
National Origin _X_ **(Specify: Limited English Proficient)**
Religion ___ **Method of Payment** ___ **(Specify:**)
Age ___ **(Specify:**) **Sex** ___
Disability ___ **(Specify:**) **Other reason** ___ **(Specify)**

5. **Contact information:** Please contact complainants through counsel. Any communication to Huot Hoeung should be conducted in Khmer.

6. **Additional contact information:**
   NA

EXHIBIT F

7. **Counsel:**
Paul M. Uyehara
Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102
215-981-3718/3700 (tel)
215-981-0436 (fax)
puyehara@clsphila.org

8. **Dates the Alleged Discrimination Took Place:**
Earliest: 1/24/03
Latest: Ongoing

9. **Explanation of any Delay Beyond 180 Days in Filing Complaint:**
NA.

10. **Explain What Happened:**

The United States Trustee for Philadelphia refused to provide an interpreter for complainant Huot Hoeung, who speaks very little English and cannot read English, at her mandatory meeting of creditors in her bankruptcy case. He also uses documents and forms important to the bankruptcy process which are available only in English. Complainant Consumer Bankruptcy Assistance Project (CBAP) is a pro bono legal services agency serving a substantial population of limited English proficient debtors. CBAP has had to provide its own interpreters for the meetings. The U.S. Trustee has failed to establish any plan or protocol to provide meaningful access to limited English proficient debtors and claims it has no responsibility to provide any language services. Indeed, the U.S. Trustee manual, section 2-2.4.1, erroneously implies that the trustee has no obligation to provide interpreters for debtors and recommends, contrary to established principles in existing guidances, that attorneys and relatives should be used to interpret. Similar provisions are in the handbooks for the Chapter 7 and Chapter 13 Trustees.

The facts are set forth in detail in the attached statements of complainants Huot Hoeung and CBAP and counsel.

11. **Explain any Actions to Retaliate or Intimidate You in Connection with your complaint:**

NA

12. **Witnesses and Contacts to Support or Clarify Complaint: (in addition to complainants, counsel and subject)**

Gloria M. Satriale, Esq., Panel Trustee
1 McKinley Lane,
Chester Springs, PA 19425
(610) 827-4038

Janet Lewis, Bankruptcy Analyst
Office of the UST
601 Walnut Street, 950 West
Philadelphia, PA 19106
(215) 597-4411

13. Other Relevant Information:

Bankruptcy practitioners in at least two other districts reported to counsel that they have been unable to obtain interpreters from their U.S. Trustees as well. It has also been reported that the bankruptcy information sheet relied upon by the trustees may be available only in English and, in some jurisdictions in one or two other languages. It is believed that the experience of the complainant is indicative of a nationwide lack of a plan and policy for assisting LEP debtors.

14. Remedies Sought:

a. The Philadelphia office of the U.S. Trustee (UST) should immediately arrange for a qualified interpreter to be provided for Huot Hoeung at her 341 meeting.

b. The Executive Office of the U.S. Trustee should be mandated promptly to conduct an assessment of language needs and resources, create a national language access plan including provisions to provide for qualified interpreters for all LEP debtors in bankruptcy proceedings conducted by the UST, notify the public and bankruptcy bar of the plan, train staff, and monitor the implementation of the plan. The plan should include a protocol for translation of vital documents issued or used by the UST in communicating with debtors. Appropriate amendments should be made to the trustee reference manuals. The plans should be devised in consultation with interested stakeholders, including language access advocates, bankruptcy practitioners and LEP group representatives.

c. The DOJ Departmental Plan Implementing Executive Order 13166 should be amended to classify local offices of the UST as a "Category D" DOJ component which has regular interaction with significant numbers of LEP persons in matters of important individual interests, i.e., the administration of the bankruptcy system, which must develop and implement a language assistance plan.

15. Have you filed the same or other complaints with other offices of the Department of Justice?

Yes ___ No X

16. Have you filed, or do you intend to file, this complaint with any other Federal, State or Local Government agency?

Yes ___ No X

17. **If your answer to the last question is yes, please provide details on the complaints filed:**

NA

18. **Please sign and date the complaint:**

huot hoeng Dated: 2/28/03
HUOT HOENG (as explained by counsel and interpreted by telephone)

Mary Anne Lucey Dated: March 3, 2003
MARY ANN LUCEY
Executive Director
Consumer Bankruptcy Assistance Project

STATEMENT IN SUPPORT OF COMPLAINT

1. My name is Huot Hoeung and I am the complainant in this matter.

2. My first language is Khmer (Cambodian). I grew up in Cambodia. I had no formal education there. I have been in the U.S. since 1984. I speak only a minimal amount of English and am uncomfortable conducting any important business matters in English. I do not read any English.

3. Because I had trouble paying my debts, I obtained help from Paul Uyehara to file a Chapter 7 bankruptcy for me. I was worried because people called me every day asking for money I could not afford not afford to pay. The bankruptcy was filed in January 2003.

4. I request a qualified interpreter to assist me with the meeting of creditors. I would not understand what is being said at the meeting without an interpreter. I want to be sure that I understand all the questions and that the trustee and my lawyer understand what I say.

5. I request that the trustee provide interpreter and translating assistance to all debtors who don't speak English well.

6. The contents of this statement were sight translated for me into Khmer by a telephone interpreter.

huot hoeung
HUOT HOEUNG 2/23/03

STATEMENT IN SUPPORT OF COMPLAINT

1. My name is Mary Anne Lucey. I am the Executive Director of the Consumer Bankruptcy Assistance Project (CBAP) located in Philadelphia. I have worked at CBAP for eight years.

2. CBAP is a pro bono, non-profit legal services provider which specializes in providing free attorneys for low income debtors in the City of Philadelphia who seek the protections afforded by a Chapter 7 bankruptcy. Most of our clients are represented on a pro bono basis by private bankruptcy practitioners. Some clients are represented by attorneys on our staff. Our staff consists of a director, a project coordinator/attorney, a part time attorney and a volunteer paralegal.

3. Huot Hoeung was referred to Paul Uyehara at Community Legal Services for bankruptcy assistance.

4. CBAP volunteers and staff file approximately 450 bankruptcy petitions per year. I estimate that some 15% of our clients are limited English proficient.

5. In our experience, the bankruptcy trustees have never offered to provide interpreters to any of our clients for the required meeting of creditors. Instead, they expect us to bring an interpreter for the trustee. In some cases, we have used friends or relatives to do the interpreting. In one of our cases, a volunteer interpreter we had arranged for failed to appear and we used the debtor's daughter to interpret for her as well as for another Spanish speaking debtor. We are aware of no effort by the panel or U.S. Trustees to assure that the interpreters are competent.

6. At each §341 meeting of creditors, all debtors are required to read and sign an oath to tell the truth during the meeting. The oath is available in English only. At each meeting, all debtors are also expected by the panel trustee to read a "bankruptcy information sheet" available in the waiting room before the meeting commences. During the meeting, the trustee will ask if the debtor has read the sheet and understood it. At least one panel trustee will interrupt the meeting and send the debtor outside if she reports not having read the sheet. The sheets are available in English only. No signs are posted in the meeting room in any language other than English.

7. The U.S. Trustee is willing to provide sign interpreters for hearing impaired debtors.

Mary Anne Lucey

MARY ANNE LUCEY
Executive Director
Consumer Bankruptcy Assistance Project

Dated: March 3, 2003

STATEMENT IN SUPPORT OF COMPLAINT

1. My name is Paul M. Uyehara and I am the attorney representing the complainants in this matter. I also represent Huot Hoeung in her chapter 7 bankruptcy.

2. A meeting of creditors was scheduled for Ms. Hoeung for 2/11/03. I wrote to panel trustee Gloria Satriale on 1/23/03 to request that a qualified Cambodian interpreter be provided for the meeting. Ms. Satriale called me promptly and said that I needed to contact the U.S. Trustee's (UST) office to request an interpreter or that I could bring one myself and she would swear in the interpreter.

3. I then contacted the U.S. Trustee's office and was informed by an employee that I needed to speak to Janet Lewis, who was responsible for arranging interpreters. I spoke to Ms. Lewis, who initially told me that debtors are required to provide their own interpreters. She then referred to a policy from the U.S. District Court which she indicated was used as a model for the UST. However, she then acknowledged that the court's policy required interpreters for limited English proficient parties. At this point, she said she would need to consult with others about how to respond to my request. The next day, she called back to tell me that the office was under no statutory requirement to provide interpreters for LEP debtors.

4. On January 30, 2003, I spoke with Frederic J. Baker, the Senior Assistant U.S. Trustee, who repeated that his office had no statutory duty to provide interpreters and that no interpreters would be provided. He did say that my client was welcome to attend the meeting and that she could bring an interpreter of her choosing. Although I informed him that I believed his office was required by Executive Order 13166 and Department of Justice policy to provide interpreters for LEP debtors, he would not agree to investigate my claim and provided no specific statement of his office's policy as to providing language services to LEP debtors. He did offer to bring the issue to the attention of his superiors in Washington. I sent him a confirming letter that day, which is attached hereto.

5. On 2/10/03, Mr. Baker called and said that officials in Washington were reviewing the issue. He offered to proceed with the meeting with the debtor providing an interpreter, or to pass on a request to the panel trustee to continue the meeting. I told him we would like to wait for his office to provide an interpreter. Thereafter, an employee of the panel trustee informed me that the 341 meeting would be postponed until 3/27/03 pursuant to the request of the UST.

6. I have received e-mail from consumer bankruptcy practitioners which indicates that in at least two other districts, the UST also will not provide interpreters for section 341 meetings of creditors. An attorney from a third state stated that she is bilingual and routinely serves as an interpreter for her LEP clients at section 341 meetings. I also was told that some other districts also provide bankruptcy information sheets in English only. However, two colleagues reported that the sheets were available in one or two languages other than English. In my ten years plus experience as a consumer bankruptcy lawyer, the sheet, as well as the debtor's oath form, is provided in English only, as is another information sheet handed to the debtor at the conclusion of the meeting.

7. The published handbook for U.S. Trustees discussion on the treatment of LEP debtors in Chapter 7 cases is completely contrary to E.O. 13166, the spirit of the DOJ Title VI guidance, and commonly accepted practices on language access. The manual, section 2-2.4.1, suggests that the trustee has no obligation to provide an interpreter and recommends that the trustee use relatives or attorneys who happen to be present to interpret. Similar provisions are found in the handbooks for Chapter 7 and Chapter 13 Trustees.

8. The DOJ Departmental Plan Implementing Executive Order 13166 classifies the Executive Office of the UST as a Category A component which has little or no contact with LEP persons due to its internal or administrative function within DOJ. However, the local offices of the UST are responsible for supervising or conducting mandatory 341 meetings of creditors in all bankruptcy cases and regularly are involved in bankruptcy proceedings. UST staff therefore have regular contact with LEP debtors and creditors and should be classified as a "Category D" DOJ component, as are the local U.S. Attorneys.

9. The Bankruptcy Code provides critical protections for consumers by stopping harassment by collectors and providing a fresh start for those overwhelmed with debt. Some consumers file bankruptcy in order to avoid loss of their home to foreclosure, while others need the help to prevent loss of utility services. Many people are forced into bankruptcy as a result of marital separation, illness, loss of work, or the death of a family breadwinner.

All debtors in both Chapter 7 and 13 must attend a meeting of creditors presided over by a trustee and must "submit to examination under oath." 11 U.S.C. § 343. At least in Philadelphia, the oath is in writing and signed by the debtor. The meeting is tape recorded by the trustee. Bankruptcy Rule 2003(c). The debtor must cooperate with the trustee. 11 U.S.C. § 521(3). During the meeting, the trustee asks the debtor many questions under oath to ascertain that the voluminous bankruptcy schedules and statements filed by the debtor are accurate, that the case is being filed in good faith, and that the debtor has some understanding of the bankruptcy process. If any creditors attend, they can also question the debtor about the case and the debtor's intentions.

In Chapter 7 cases, the Code mandates that the Trustee provide important basic information to the debtor about bankruptcy. 11 U.S.C. § 341(d). In practice, that information is conveyed in Philadelphia by means of a bankruptcy information sheet distributed to all debtors at the meeting. The trustee questions each debtor to assure that she has read and understood the form. Another information sheet is handed out at the conclusion of the meeting. Should the debtor fail to attend the meeting (or, presumably, attend and fail to participate), the trustee can and will move to dismiss the case. Finally, making a false statement under oath in a bankruptcy is a federal felony punishable by 5 years imprisonment and a $5,000 fine. 18 U.S.C. § 152.

Thus, the ability to participate in the meeting of creditors is essential to afford LEP debtors meaningful access to the bankruptcy system to the same extent that English proficient debtors can participate. Assuring that qualified interpreters are available to debtors is necessary so that the debtor can understand the proceedings. Qualified interpreters also help assure that the trustee is obtaining accurate information from the debtor. Neither of these purposes is well served by the current practice of allowing anyone to interpret, not providing any translations, and leaving trustees untrained in how to work with interpreters.

10. I believe that the Executive Office of the U.S. Trustee could benefit from consulting

with the consumer and creditor bankruptcy bars, language access advocates, and ethnic or community based organizations that serve LEP populations in devising remedies. The complainants and I would in particular welcome participation in the remedial process.

Dated: 3/3/03

PAUL M. UYEHARA
Staff Attorney
Community Legal Services, Inc.

COMMUNITY
LEGAL SERVICES, INC.

1424 Chestnut Street, Philadelphia, PA 19102-2505
Phone: 215.981.3700, Fax: 215.981.0434
Web Address: www.clsphila.org

January 30, 2003

Frederic J. Baker, Esquire
Senior Assistant U.S. Trustee
601 Walnut Street, Room 950 West
Philadelphia, PA 19106

Re: Language Access to Section 341 Meetings

Dear Fred:

I write to confirm the substance of our telephone conversation of today and to request your assistance in obtaining further review of this important policy question. As I mentioned, I am representing a limited English proficient couple who have filed a chapter 7 bankruptcy. They are scheduled for a Section 341 meeting on February 11. I requested that your office arrange to provide a competent Cambodian interpreter for my clients so that they may participate in the meeting in the same manner that an English speaking debtor would. I should add that providing a competent interpreter will also assure that the panel trustee is able to obtain reliable answers from the debtors to her questions.

In our conversation you informed me that your office provides sign interpreters for hearing impaired debtors but does not provide interpreters for limited English proficient debtors. You suggested that the debtors were free to bring a relative or friend to interpret for them. You also declined to state specifically whether your position is set forth in an affirmative policy statement from the executive office for U.S. Trustees. If I misunderstood anything that you said, please let me know.

I mentioned to you that it is my belief that your office is obligated by provisions of executive order 13166 as well as the stated policy of the Department of Justice to assure that limited English proficient debtors can have meaningful access to all activities conducted by your office. The easiest way to access the executive order and various guidances and DOJ memoranda is to visit the web site at www.lep.gov.

I hope that you will reconsider this policy as to your office and also to follow through on your suggestion to have the matter further reviewed by senior staff in the United State Trustee Program in Washington. I will seek to bring the issue to the attention of DOJ staff as well.

If you have any further thoughts on this matter, please don't hesitate to call me at 215-981-3718. Thank you for your attention to this matter.

Very truly yours,

PAUL M. UYEHARA

PMU:jmp

cc: Gloria Satriale

EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
20 Massachusetts Avenue, NW
Suite 8000
Washington, D.C. 20530

Language Assistance Plan For Implementation Of Executive Order 13166

Sue Ann Slates, LEP Coordinator
August 31, 2004

EXHIBIT G

EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
LANGUAGE ASSISTANCE PLAN FOR
IMPLEMENTATION OF EXECUTIVE ORDER 13166

Sue Ann Slates, LEP Coordinator
August 31, 2004

1.0 PURPOSE

In compliance with Section 2 of Executive Order 13166, this Language Assistance Plan details the Executive Office for United States Trustees' (EOUST) initiatives and plans to improve access to the United States Trustee Program's (USTP) federally-conducted programs and activities by eligible individuals of limited English proficiency (LEP). For purposes of EOUSTs' Language Assistance Plan, the definition of "federally-conducted programs and activities" is identical to that used under the regulations implementing Section 504 of the Rehabilitation Act of 1973. 28 C.F.R., Part 39, Editorial Note; *Section 39.102 Application.* Neither Executive Order 13166 nor this Language Assistance Plan creates any new right(s), including the right to seek administrative or judicial enforcement, on the part of any person, including a person with limited English proficiency.

2.0 BACKGROUND

On August 11, 2000, the President issued Executive Order 13166, titled "Improving Access to Services for Persons With Limited English Proficiency." 65 FR 50121 (August 16, 2000). On the same day, the Assistant Attorney General for Civil Rights issued a Policy Guidance Document, titled "Enforcement of Title VI of the Civil Rights Act of 1964 – National Origin Discrimination Against Persons With Limited English Proficiency" (DOJ LEP Guidance), reprinted at 65 FR 50123 (August 16, 2000). Subsequently, the Department of Justice (Department or DOJ) adopted final LEP guidance for recipients of federal financial assistance, titled "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons" (LEP Guidance for DOJ Recipients), reprinted at 67 FR 41455 (June 12, 2002).

Executive Order 13166 requires federal agencies to assess and address the needs of otherwise eligible persons seeking access to federally-conducted programs and activities who, due to limited English proficiency, cannot fully and equally participate in or benefit from those programs and activities. The DOJ LEP Guidance in turn advises each federal department or agency to "take reasonable steps to ensure 'meaningful' access [to LEP individuals] to the information and services they provide." DOJ LEP Guidance, 65 FR at 50124. This standard is achieved by balancing the following four factors: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available and costs. 65 FR at 50124; 67 FR at 41459.

3.0 LEP STAKEHOLDER CONSULTATIONS

The Department has provided for a Stakeholder Consultation process to the DOJ Plan for Implementation of Executive Order 13166, which was incorporated in the guidance provided to agencies for ensuring equal access to federal government services by LEP populations. Entities or persons having a direct and substantial interest in the provisions of the DOJ Plan (Stakeholders) include both the individual components of the Department (entities responsible for implementing DOJ's Plan), as well as LEP communities (the intended beneficiaries of the language assistance initiatives set out in the DOJ Plan). The EOUST will not conduct further Stakeholder consultations in implementing its Language Assistance Plan.

4.0 DOJ PLAN FOR IMPLEMENTATION OF EXECUTIVE ORDER 13166

In an effort to implement Executive Order 13166, the Department identified five important elements of an acceptable Language Assistance Plan. The elements are:

- Assessment of LEP populations and language needs;
- Publication of a written Language Assistance Plan;
- Provision for appropriate staff training about the Language Assistance Plan;
- Public outreach and notice of the availability of language assistance; and
- Periodic self-assessment and self-monitoring.

4.1 EOUST Assessment Overview

The USTP's mission is to act in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system. It works to secure the just, speedy, and economical resolution of bankruptcy cases; monitors the conduct of parties and takes action to ensure compliance with applicable laws and procedures; identifies and investigates bankruptcy fraud and abuse; and oversees administrative functions in bankruptcy cases to promote and defend the integrity of the federal bankruptcy system. To that end, the EOUST, which is headed by a Director appointed by the Attorney General, directs policy and legal matters, oversees the Program's substantive operations, and handles administrative functions.

While the EOUST generally does not itself engage in activities having a direct and substantial impact on significant LEP populations, the local United States Trustee Offices (USTO) do perform services and collect information from and provide information to members of the general public. Depending on the geographic location, the population served can include significant LEP populations. Accordingly, the USTP has been identified by the Department's Civil Rights Division, Coordination and Review Section (CRT/COR), as a component whose mission or primary function is to serve the legal, investigative, and policy needs of the Department or the Executive Branch in a manner that involves (and in some cases is dependent upon) interactions with the public, including predictable and periodic interactions with identifiable LEP populations in the performance of its duties.

The EOUST developed and conducted a LEP survey, titled "Survey Regarding Language Assistance Services," of the EOUST and 95 USTOs to identify predominant LEP populations and languages, and to evaluate the extent to which the USTP has contact with LEP individuals, the need to provide language assistance to LEP persons nationwide, the resources available, and the current language assistance services being provided by USTP. The EOUST issued a report, titled "Executive Office for United States Trustees' Limited English Proficiency (LEP) Assessment Report," which provides an evaluation and analysis of the survey data.

4.2 EOUST Language Assistance Plan

In an effort to take reasonable steps to ensure "meaningful access," the EOUST proposes to implement the following Language Assistance Plan. The EOUST will establish a LEP Pilot Project in seven USTOs that serve and/or interact with significant LEP communities over a one-year period, from October 1, 2004, through September 30, 2005. For the purposes of the "EOUST Language Assistance Plan" and the "Uniform Language Assistance Initiatives," the acronym "USTO" refers only to offices that are taking part in the LEP Pilot Project. The EOUST will designate seven USTOs to participate in the LEP Pilot Project by the middle of September 2004.

4.2.1 *Language Assistance Principles*

As an initial matter, the EOUST and the USTOs involved in the LEP Pilot Project adopt the following language assistance principles for situations in which a LEP individual is seeking language assistance in order to participate in a meeting of creditors conducted by USTO staff or private trustees, or is seeking to obtain a direct EOUST or USTO service or benefit, or where there is potential for the direct imposition of a burden by the EOUST or the USTOs.

- LEP persons should be advised that for participation at creditors' meetings they may choose either to secure the assistance of an interpreter of their own choosing, at their own expense, or that a competent interpreter will be provided by the USTP. The provision of this notice and the LEP person's election should be documented.

- The EOUST and the USTOs should take reasonable steps appropriate to each circumstance to ensure that they provide interpretation and translation services only through individuals who are competent to provide such services at a level of fluency, comprehension, and confidentiality appropriate to the specific nature, type, and purpose of information at issue.

- The EOUST and the USTOs should endeavor to expand the range or nature of language assistance measures (including the provision of services in languages in addition to those specified in EOUSTs' Language Assistance Plan) whenever experience, change in target or service population demographics, or new program-specific data indicates that the failure to do so may result in a denial of substantially equal and meaningfully effective services to a significant LEP population served by the EOUST or USTO.

- To the maximum extent practicable, limited English proficiency shall not act as a barrier or otherwise limit access to vital information, i.e., information publicly available in English as to when, where, or how to access benefits or services from the EOUST or the USTOs.

4.2.2 *Uniform Language Assistance Initiatives*

1. *Oral Information*

Each designated USTO will have in place personnel or language assistance resources capable of providing, within a reasonable period of time, information and/or instructions in appropriate languages other than English. Each designated USTO will complete the following tasks by the end of six months (March 2005):

- Have in place, wherever public contact occurs, bilingual or multilingual staff, appropriate translations of frequently requested information in commonly encountered languages (e.g., Bankruptcy Information Sheets[1]), or procedures for access to telephonic interpretation services for use by USTO personnel.

- Have in place, speaker telephones in all creditors' meeting rooms where possible, language identification cards, and a resource list for in-person and telephone language assistance services.

- As appropriate, the written procedures for accessing in-person and telephone language assistance resources will be: (1) inserted into every office telephone book (both written and electronic); (2) posted or otherwise made readily available (e.g., through a component Intranet system) at every point of public contact; and (3) distributed to every employee whose duties routinely include contact with members of the public.

- Complete and distribute to each duty station, facility or, as appropriate, work group, a listing of staff members assigned to that duty station, facility, or work group who have volunteered to provide temporary language assistance services for walk-ins, telephone calls, and correspondence to the USTO. Such staff members should be identified by name, office, physical location, business telephone number, work hours, language, and level of fluency. Bilingual and multilingual staff may assist with contacts made by LEP persons to the USTO. Because of a conflict of interest, however, UST staff will not act as interpreters for LEP debtors at meetings of creditors where the debtors are questioned under oath.

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[1] Bankruptcy Information Sheets contain general information on chapters 7, 11, 12, and 13 of the Bankruptcy Code, describe how a bankruptcy discharge operates, and explain the criteria for reaffirmation agreements. These documents are currently available in English, French, Spanish, and Vietnamese and will be translated into additional languages as needed.

- In-person interpreters and telephone interpreters who provide language assistance services at meetings of creditors will be placed under oath along with LEP debtors.

2. *Electronic Information*

Each designated USTO that maintains a web page accessible to members of the general public should include information on the availability of language assistance through or by the USTO. Where documents in languages other than English are placed on or accessible through the web page, information on their availability should be included in the appropriate languages on the web home page or other initial point of access. This element of the Language Assistance Plan shall be completed by the end of six months (March 2005).

3. *Signage*

Where signage within a publicly-accessible duty station or facility maintained or administered by the USTOs is provided in English, it will also be provided, at a minimum and as soon as reasonably practicable, in the two most common non-English languages spoken in the area served by the duty station or facility. Based on currently available data, this will be required where more than 25 percent of the population within those language groups speak English less than well. Available data includes, but is not limited to, language and demographic census information pertaining to the area or region served. Currently, U.S. Census 2000 data is available concerning LEP populations broken down by state and locality for use by the designated USTO pilot districts. This element of the Language Assistance Plan shall be completed by the end of six months (March 2005). By the end of three months (December 2004), each designated USTO will develop and file with EOUST a signage implementation report and timetable.

4.2.3 *Component-Specific Language Assistance Initiatives*

In the discharge of its legal and civil enforcement activities, EOUST will complete and submit to CRT/COR a report of all designated USTOs' language assistance services to ensure that its LEP practices are consistent with the compliance standards for entities receiving federal financial assistance as set forth in the LEP Guidance for DOJ Recipients, reprinted at 67 FR 41455. This will be accomplished by the end of 24 months (September 2006).

4.3 Staff Training

Employees expected to implement the language assistance initiatives set out in EOUSTs' Language Assistance Plan should be knowledgeable about: (1) the nature and scope of language assistance services and the resources available through their employing component; and (2) the procedures through which they may access those services to assist in the discharge of their respective duties. By the end of six months (March 2005), all employees identified by USTOs as being critical to the implementation of the Language Assistance Initiative shall:

1. be provided with written information on the scope and nature of available or planned language assistance services and the specific procedures through which such services can be accessed at the employee's work location; and

2. develop and incorporate into new employee orientation and/or training programs a module on the nature and scope of language assistance services and the specific procedures through which each employee can access those services.

4.4 Outreach

LEP individuals in need of language assistance services should have reasonable notice of the availability of such services. Designated USTOs with significant LEP contacts will undertake appropriate written and oral outreach efforts designed to alert LEP communities and individuals as to the nature, scope, and availability of the language assistance services set out in EOUSTs' Language Assistance Plan. In the area of outreach, the EOUST and designated USTOs will take the following actions:

1. Where documents are available in languages other than English (e.g., Bankruptcy Information Sheets), the English version will include a notice of such availability in all languages in which the document is available.

2. Where documents are available for viewing or downloading through a component web page in languages other than English, an indication of such availability in each of the relevant foreign languages will be included on each web page.

3. To the maximum extent possible, the EOUST and designated USTOs will strive to inform Stakeholder organizations of the nature and scope of available language assistance services through appropriate oral and written means.

4.5 Monitoring

Language Assistance Plans should be periodically reassessed to ensure that the scope and nature of language assistance services provided under the Plan reflect updated information on relevant LEP populations, their language assistance needs, and the USTOs' experience under the Plan. Over the next 36 months, the EOUST will take the following actions to monitor the effectiveness of its language assistance initiative and to assess the possible need for enhancements or modifications to those initiatives.

1. By the end of 12 months (September 2005), the EOUST will devise, with consultation from the CRT/COR, appropriate methods to assess USTO activities under the Language Assistance Plan.

2. By the end of 15 months (December 2005), all designated USTOs will submit a LEP Pilot Project Report to the EOUST.

3. By the end of 18-21 months (March-June 2006), the EOUST will conduct a review of the LEP Pilot Project and the EOUSTs' Language Assistance Plan.

4. By the end of 24 months (September 2006), the EOUST will submit a report of the LEP Pilot Project to the CRT/COR. The EOUST will also develop a revised Language Assistance Plan for all USTOs with recommendations regarding a phased-in, nationwide expansion of the Language Assistance Plan.

5. By the end of 36 months (September 2007), the EOUST will provide a report to the CRT/COR on the progress of the phased-in, nationwide implementation of the Language Assistance Plan.

COMMUNITY
LEGAL SERVICES, INC.

1424 Chestnut Street, Philadelphia, PA 19102-2505
Phone: 215.981.3700, Fax: 215.981.0434
Web Address: www.clsphila.org

September 5, 2006

Executive Office for US Trustees
Credit Counseling Application Processing
20 Massachusetts Avenue, 8th Fl
Washington, DC 20530

Re: EOUST Docket 100
Comment on Proposed Rule

Dear EOUST Staff:

On behalf of an agency that serves low income debtors in bankruptcy, many of whom are limited English proficient (LEP), I submit these comments in an effort to assist your office in improving the application and approval process to minimize discrimination against LEP debtors. The comments are divided into sections which define the deficiencies in the current system and proposed rule, proposed changes to the rule, proposed changes to the forms and proposed changes in EOUST's management of the system.

EXISTING LANGUAGE ACCESS PROBLEMS IN THE SYSTEM

There are numerous debtors across the country who don't speak, understand or read enough English to benefit from participating in English only counseling programs. We have experienced a number of problems with providers and EOUST since last year with respect to language access. Those problems include:

- Lack of information on language services
  - As you know, the EOUST listings of approved providers disclosed no language information for six months or more after bankruptcy reform went into effect.
  - EOUST currently displays language information specific to each provider, but the information is not specific enough to allow clients to exercise informed choices about the nature of the services provided. Many entries are under the heading "languages other than English"which lists languages without identifying whether the services are direct counseling in a second language, in person interpreting, telephone interpreting or translation of a web based program.
  - Information on the EOUST lists is not reliable. Some providers have language capacity which is unknown to the public, the UST, and even some customer service staff of the provider, while others claim capacity that they cannot provide.

- The websites for many providers do not provide any readily locateable information about language services, including those which are listed as providing such services.
- Many providers have no language services. According to posted information, a large number of approved providers have no capacity to provide services in any languages other than English.
- Some providers offer services only in Spanish or a few other languages.
- Rather than assisting LEP debtors unable to locate counseling they can participate in, UST staff and EOUST have attacked debtors who filed when no services could be located, and have denied requests from counsel to provide referrals, provide interpreters or to waive the requirements.
- Some providers are expecting debtors to provide their own interpreters, without regard to whether the interpreters are competent or free.
- Availability of language services is much worse with financial management courses.
- LEP clients have fewer providers to choose from and, when interpreters are used, will generally require sessions that are much more lengthy and less informative than English speaking debtors.
- Some LEP clients have been delayed in filing or were unable to access the Bankruptcy Court due to the unavailability of counseling, have faced delay or denial of a discharge when debtor education couldn't be found, or faced other obstacles, delay and expense solely due to their English language ability.

The US Trustee is charged by numerous provisions of the bankruptcy code with the responsibility to create and monitor the credit counseling and financial management systems which provide effective services to debtors through a large number of agencies, most of which are non governmental organizations. Because these services are provided to the public only through agencies which are approved and monitored by EOUST using comprehensive and detailed criteria, the counseling system is appropriately viewed as a federally conducted program. Accordingly, EOUST is required by the provisions of Executive Order 13166, 65 Fed. Reg. 50121 (August 6, 2000) to ensure that LEP debtors can "meaningfully access" the educational programs which are being delivered pursuant to federal standards. The importance of non-discriminatory management of the programs cannot be overlooked. Consumers who are unable to access credit counseling are denied access to the benefits of the US Bankruptcy Courts and those unable to access debtor education courses are denied the benefit of a discharge of their debts. Others may face delay, difficulties and expenses based on their English language ability.

The process by which EOUST sets criteria for approval and standards for practice by agencies provides the means by which to ensure that the systems are conducted in a manner consistent with the Executive Order and DOJ policy. EOUST has inappropriately decided at the outset, and in drafting the rule, not to set language access policy for providers.

§ 58.15

This section establishes criteria for agency approvals and should be modified to mandate that

the agencies provide language appropriate services. A new section (j) should be added and reference made to it as a requirement in section (b).

(j) Language Access. Each agency must:

(i) Submit with each application for approval or re-approval the agency's written Language Assistance Plan which meets the standards set forth in the DOJ LEP Guidance, 67 F.R. 41455 (6/18/02) applicable to DOJ grantees, notwithstanding whether the agency actually receives financial assistance from DOJ;

(ii) At no charge to clients, provide language services so that LEP clients can meaningfully participate in counseling sessions;

(iii) In any print or electronic advertising of its services, including an Internet website, plainly disclose that the agency will provide free language services to LEP clients. The agency shall further disclose the specific languages other than English in which it is capable of providing uninterpreted counseling sessions.

§ 58.16

No changes are recommended here. However, I do recommend changes to the application forms as explained below.

§ 58.25

The qualifications for approval of personal financial management classes should be amended to cover language access requirements as follows:

(f)(5) The provider shall also devise plans to modify learning materials and methodologies so that limited English proficient debtors can meaningfully participate in the course. The plans should differentiate between the methods to be used when the course is taught directly in a language other than English and those to be used when an interpreter is involved.

(i) Language Access. Each provider must:

(i) Submit with each application for approval or re-approval the agency's written Language Assistance Plan which meets the standards set forth in the DOJ LEP Guidance, 67 F.R. 41455 (6/18/02) applicable to DOJ grantees, notwithstanding whether the agency actually receives financial assistance from DOJ;

(ii) At no charge to clients, provide language services so that LEP clients can meaningfully participate in debtor education sessions; and

(iii) In any print or electronic advertising of its services, including an Internet website, plainly disclose that the agency will provide free language services to LEP clients. The agency shall further disclose the specific languages other than English in which it is capable of providing uninterpreted counseling sessions. All language specific information shall distinguish between languages in which the agency can provide uninterpreted instruction in the client's primary language, those which will involve an interpreter, and shall further distinguish between instruction provided in-person, by telephone or by Internet.

[Renumber subsequent subsections.]

(k)(2)(vii) A statement that the provider will provide language services so that LEP clients can meaningfully participate in courses.
(viii) A list of the languages in which instruction can be provided directly by bilingual instructors without the use of interpreters and a list of languages which the agency can provide instruction through a qualified interpreter. Each list shall distinguish whether the instruction is provided in person, by telephone or by Internet.

FORMS AND INSTRUCTIONS

Application

Add new section 7.2.

7.2 Attach to Appendix E a report which tabulates, by counseling method and by language, the number of LEP clients served and the forms of language assistance provided.

Instructions - Credit counseling.

1. Section 4.4. Add to end of paragraph: The agency shall not charge LEP clients extra fees for language services.

2. Section 5.4. Language Access. The agency must make a good faith effort to hire bilingual counselors who can provide instruction in languages other than English, and bilingual non-instructional staff who can provide customer service to LEP clients or act as interpreters for other staff. In completing Appendix D, a counselor with Second Language Fluency is fully and demonstrably fluent in a language other than English, including terms likely to be used in the credit counseling course. Trained interpreters are staff, including counselors, who are available to provide interpreting services, demonstrably fluent and trained in interpreting techniques and ethics.

3. Section 8.1. The Agency must also disclose to LEP clients that it will provide free language services so that LEP clients can meaningfully participate in courses.

Appendix A

21. It will provide meaningful access to counseling to LEP clients and will implement the provisions of its written Language Assistance Plan, a copy of which must be submitted with the application.

Appendix C

The form currently and appropriately distinguishes between the languages available for each form of counseling - in person, telephone, telephone/internet and Internet. The form should be further improved to distinguish the manner in which each language is serviced for the methods other than Internet.

Direct second language instruction. Instructors demonstrably fluent in a second language provide counseling to the LEP debtor in his or her primary language, without an

interpreter. This method is faster and more accurate for the instructor as well as the client as compared to interpreted sessions.

Interpreted instruction. A monolingual instructor conducts the session in English with the assistance of a qualified professional interpreter in person or by telephone. This approach may take three times as long as direct instruction, is less accurate and more difficult for both instructor and client. With wireless equipment and extremely well qualified interpreters, simultaneous interpretation could be used in classroom settings and would largely reduce the extra time needed to complete the course.

Because of the dramatic differences in ease of use, time needed, and benefit, the availability of language services should be determined and published in much greater detail to allow informed choice by clients.

The last section of the page should be modified to allow space to specify what languages are available for in person counseling at each location.

Appendix D

A new section should be added to gather language information on counselors. Under Language Skills, two check boxes could be added: Second language fluency and Trained interpreter. This information should be expanded to gather data on non-counseling staff as well, since they may be involved in customer service and could act as interpreters. Note relevant instructions should be changed to explain this as noted earlier.

Appendix E

Add new box below the first one for "Total number of LEP clients counseled."

EOUST Management of System

As can be seen from the attached letter of May 18, 2006 from a large number of organizations, language access problems have been brought to the attention of EOUST for over a year with minimal response. The lack of response is exemplified by the office's failure in issuing these proposed rules to provide any guidance to providers to increase language services. In violation of EO 13166, EOUST continues to act as if language is the debtor's problem and that it has little concern or responsibility if LEP clients have less access to bankruptcy and bankruptcy counseling than English proficient clients. In the interests of justice and fair treatment, EOUST ought to be actively involved in managing the counseling system to eliminate language bias and should take responsibility to aid LEP clients who encounter language barriers in the bankruptcy system.

The existing EOUST website which lists available providers is poorly presented and extremely difficult to use, particularly with respect to language information. A more professional presentation would help all consumers by eliminating the following problems:

- The two lists exist as a single document covering all providers in all districts, with links to states rather than specific districts. This requires the user to scroll through the list, which has no markers identifying the district the user is in along the way

except when crossing into a new district, making it very easy to get lost and even end up in the wrong state. The list would be better if district links went to separate pages for each district.

- Consumers seeking to print a list of providers in their district cannot do so easily, since the website will prepare for printing a huge and redundant list covering the entire state. For Illinois, for example, the list is 100 pages long.

- The language data, as noted earlier, does not distinguish between interpreted services and direct services in the client's language.

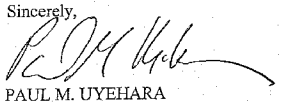
- The language data is not consistently specific to the method of instruction and location. Thus, for example, an LEP client seeking Spanish in person counseling at location A may not realize that the agency only provides Spanish at location B, which is too far away.

- There is no method to conduct searches on the page to isolate a particular language, location, counseling method, etc.

EOUST needs to aggressively change its approach to language to conform to federal policy. This change would help the UST program in fulfilling its mission across the board. A change would not only reduce national origin discrimination in the bankruptcy world, it would also enhance the ability of trustees to gain accurate information from LEP debtors. Obviously, LEP debtors themselves would be placed in a better position to significantly benefit from bankruptcy counseling and debtor education.

Please feel free to contact me at puyehara@clsphila.org or 215-981-3718 to follow up on these concerns.

Sincerely,



PAUL M. UYEHARA
Staff Attorney
Language Access Project

Enclosure

COMMUNITY LEGAL SERVICES
OF PHILADELPHIA

August 24, 2007

Clifford J. White III
Director
Executive Office for US Trustees
US Department of Justice
20 Massachusetts Avenue, NW, Suite 8000
Washington, DC 20530

Re: Language Access Matters

Dear Mr. White,

I write to follow up on several issues discussed at our meeting on June 27 in Philadelphia, one of which you specifically requested.

1. Internet Listings of CC/DE Providers

Although there has been improvement since the launch of the credit counseling and debtor education programs, further improvement is called for in the language capacity of providers and the manner in which the lists are arranged on the EOUST web site. The provider lists now disclose the purported language capacity of each agency, and can be sorted by language.

Using the pull down menus for languages other than English and Spanish generates a national list of all providers for the language selected. This set up is cumbersome as it requires the user to slowly scroll down the list until the desired district is found. The system would be more user friendly if the selection could be made by district and language and linked to a list of only those providers.

The number of providers in languages other than English and Spanish is inadequate. Many limited English proficient (LEP) debtors will be forced to use a single provider as there is no choice. For example, only one provider provides classes in Arabic, even in a location such as Detroit that has a large Arab-American population. Korean and Mandarin speakers have only two national providers available for credit counseling, although there is a third Mandarin agency in some districts. English speakers, on the other hand, can choose from 21 competing credit counseling agencies in Alaska and 54 debtor education programs in Maryland. Were EOUST to be more demanding of providers, there would be more choice and competition.

The terminology in the lists is confusing. Most second language services are labeled "Translator Only." The term isn't defined anywhere, but presumably means that the counselor will use an *interpreter* (who will render what each says into the spoken language of the listener).

WWW.CLSPHILA.ORG
1424 CHESTNUT STREET, PHILADELPHIA, PENNSYLVANIA 19102 P 215.981.3700 F 215.981.0434

Since *translators* work only with written words, the term suggests that the paperwork will be available in the debtor's primary language, but the discussion will be conducted in English only. It is common for the uninitiated to confuse the terms interpreting and translation, but they are not the same.

Likewise, some listings say "Printed Materials Only," suggesting that handouts are translated into the debtor's language, but there is no way for the counselor to talk to that person. These listings are so dubious that they should not be permitted except for sessions done exclusively on the Internet. To the extent that specific Internet providers are set up to conduct all communications in writing with the debtor, sessions conducted without an interpreter can be meaningful. The web listings should always separately disclose if interpreting is provided for conversations and if Internet content and other materials are translated.

Equally problematic is the lack of other language information. The best method of conducting counseling for LEP debtors is to use bilingual counselors who are able to carry out the session in the debtor's primary language, without an interpreter. This is tremendously more efficient and economical for both the provider and the debtor, since using an interpreter will likely make the session run three times as long as a same-language session and can easily incur interpreter costs that far exceed the fee charged to the debtor. Although there is presumably a certain amount of bilingual capacity in a number of languages among existing staff, no listing states that services will be provided directly in any second language. The web site should inform debtors whether the session will be conducted by a person who speaks their language or through the use of an interpreter.

The FAQ section on the website continues to include erroneous information regarding the responsibility of providers to provide language services to LEP debtors. According to your web site:

> Q: What efforts should approved credit counseling agencies undertake to accommodate clients who have no or limited proficiency in the English language?
>
> A: Approved agencies should make every reasonable effort to accommodate clients with limited or no proficiency in the English language. Such accommodation may include providing services in the client's language; permitting community volunteers, friends, or family members of the client to attend the credit counseling session and provide translation; or referring the client to an approved agency that offers services in the client's language.

This public misstatement of policy continues to undermine EOUST efforts to provide language access. This language does not conform to the requirements of Executive Order 13166, the DOJ LEP Guidance or the DOJ Implementation Plan. Fundamentally, the FAQ response fails to recognize that it is the agency's responsibility to provide meaningful access to its services, not

debtor's. The suggested use of informal interpreters provided by the debtor is contrary to this mandate and also will result in poor communication and incomplete disclosure by debtors of important information, thereby further degrading the purported benefit of the counseling sessions. And again, the inaccurate use of "translation" instead of "interpretation" should be eliminated.

2. Southern District of Florida. As I mentioned, operations in the Southern District of Florida need your immediate attention. There are three specific problems:

a. The notice regarding the pilot program was removed from the meeting rooms, leading practitioners to think that the UST has ceased providing language services at 341's.
b. The UST is issuing 341 notices to debtors which incorrectly advise that "Translation [sic] services are not provided." The forms should be immediately corrected to show that the UST will provide interpreters to LEP debtors and how to request that one be provided.
c. In Miami, a private Spanish interpreter is being permitted to be stationed in the 341 meeting rooms and to hire himself out to LEP debtors on a fee basis. In addition to demonstrating the UST's abdication of responsibility to provide language access to meetings of creditors, this practice also illustrates that the use of in-person interpreters should be considered where demand makes it economical. (In-person interpreting is generally more accurate than telephone interpreting.)

3. National provision of interpreter services at 341 meetings.

We discussed the fact that EOUST is not in compliance with its Language Assistance Plan, which required a report to COR last September on the outcome of the pilot program, with an update due next month on the national roll out of the 341 interpreter program. We look forward to an announcement from your office by next month about the national implementation of the program and again urge you to post the Language Assistance Plan on your web site.

I think I neglected to note two related matters at the meeting in June. First, the Chapter 7 and 13 Trustee handbooks have not been updated to correctly state the policy on providing interpreter services and delete the advice to the trustees to use inappropriate interpreters. In addition, only one of the pilot UST districts, the Eastern District of Pennsylvania, has information about interpreting posted on its web site. We hope these matters could be corrected promptly as well.

Finally, last September, I filed comments with your office regarding improvements to the interim final rules for application and approval of credit counseling and debtor education providers to improve language access. We hope they will receive serious consideration as the

rules are finalized.

Again, I appreciate the opportunity to meet with you and your staff in Philadelphia. My hope is that with your personal attention, EOUST will be able to move forward aggressively to ensure that language barriers to the bankruptcy system is minimized consistent with federal and departmental policy. I would be glad to discuss these matters again or provide further feedback if it would assist your office. I can be reached at 215-981-3718 or at puyehara@clsphila.org.

Sincerely,

PAUL M. UYEHARA
Senior Attorney
Language Access Project

cc: Henry J. Sommer, NACBA
Kelly Beaudin Stapleton, United States Trustee

COMMUNITY
LEGAL SERVICES, INC.

1424 Chestnut Street, Philadelphia, PA 19102-2505
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May 18, 2006

BY FAX: 202-514-0293

Wan J. Kim
Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

BY FAX: 202-307-0672

Clifford J. White, III
Acting Director
Executive Office for United States Trustees
U.S. Department of Justice
20 Massachusetts Avenue, NW, Room 8000
Washington, DC 20530

Re: Bankruptcy Education Discrimination

Dear Assistant Attorney General Kim and Acting Director White:

On behalf of persons with limited English proficiency (LEP) who may need to avail themselves of bankruptcy protection, we request your urgent and cooperative response to address the discriminatory impact of a series of decisions made by the Executive Office for United States Trustees (EOUST). In violation of Executive Order 13166 and the Department of Justice (DOJ) Departmental Plan on language access, EOUST has failed to take reasonable steps to ensure that LEP persons have meaningful access to bankruptcy. Our organizations have a wide range of experience and concerns - advocating for bankruptcy debtors, protecting the civil rights of limited English proficient people and immigrants, representing low income clients and advancing consumer interests - and we all agree this issue merits immediate response in order to provide equal access to the bankruptcy system.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 resulted in a number of changes in bankruptcy practice when it went into effect on October 17. One dramatic change was the requirement that all debtors participate in "credit counseling" before filing a bankruptcy petition, 11 U.S.C. § 109(h), and that they complete a "personal financial management" course before obtaining a discharge of their debts, 11 U.S.C. §§ 727(a)(11); 1328(g). The two mandatory courses can be provided only by agencies approved by the regional offices of the United States Trustee (UST). 11 U.S.C. § 111. The UST has ongoing responsibility to monitor the approved agencies and the authority to disapprove of those not providing adequate services. 11 U.S.C. § 111.

In devising and implementing the process to receive applications from prospective counseling agencies, EOUST did not take into account the needs of LEP debtors. As a result, it

approved lists of agencies without adequately ascertaining their capacity to provide meaningful access to LEP persons. Not surprisingly, the network of approved agencies has very little capacity to provide meaningful instruction to LEP debtors. By the end of March, EOUST had approved 142 credit counseling agencies and 241 debtor education agencies, most of which provide services nationwide by telephone or internet. While some approved credit counseling providers have some Spanish language ability, and a few claim capability in a limited number of other languages, most providers are able to deliver instruction only in English. Financial management course providers have dramatically less language capacity.

The end result is that LEP debtors are faced with barriers to entry to and exit from the bankruptcy system related solely and impermissibly to their English language ability. EOUST has designed, approved and continues to defend a system that results in national origin discrimination. Just as EOUST is implementing a program to provide interpreting services to debtors in section 341 meetings of creditors that will ultimately be applied nationwide, so should it move quickly to assure that similar services are provided in mandatory bankruptcy counseling so that can be of benefit to LEP debtors.

Since last summer, debtor advocates have repeatedly brought this problem to the attention of EOUST staff, including the LEP coordinator, as well as to regional UST's around the country. These officials have not acknowledged or addressed the discrimination which would likely flow from their failure to plan to provide effective services to LEP debtors. So far as we are aware, EOUST response has been limited to the following:

1. EOUST has inquired of the already approved agencies as to their language capacity. The information they obtained had not been released to the public until this month. The information is in a cumbersome format.

2. UST staff have refused requests to provide interpreters for LEP debtors so that they could participate in the courses. Some have advised lawyers to have the debtor bring a bilingual relative to interpret.

3. Rather than providing assistance, UST's have moved to dismiss bankruptcies filed by LEP debtors who filed a petition after being unable to find a provider.

4. One or more UST's have taken the curious position that if adequate services are being provided to non-LEP debtors by the agencies approved in a district, then the agencies must also be able to provide adequate services to LEP debtors as well. They have refused to issue a determination that, with respect to LEP debtors, the approved agencies are unable to provide

adequate services, thereby allowing those debtors to file bankruptcy without completing debt counseling. 11 U.S.C. § 109(h)(2). The UST has taken this position even when there is no dispute that counseling is unavailable from any approved agency in a given language.

5. Even after the bankruptcy judge waived the debt counseling requirement for a Creole speaking debtor in Miami, after finding that no agencies could provide him with credit counseling, the UST moved for reconsideration. The motion will be heard on May 24.

EOUST staff may have unknowingly violated the provisions of Executive Order 13166 and the DOJ Departmental Plan at the outset. However, once informed of the issue, staff in EOUST and USTO's have, as far as we can tell, only compounded their errors. They are denying LEP persons meaningful access to the bankruptcy system. For these reasons, we felt it necessary and appropriate to bring this matter to your attention to get EOUST moving quickly in another direction. We ask that EOUST, in consultation with advocates and Civil Rights Division staff, immediately undertake remedial action including:

1. Add to the approval criteria for all counseling agencies a requirement that each provider must document its compliance with the DOJ guidance on language access as if it was a DOJ grantee. Apply the criteria to new applicants as well as to the annual review process for approved agencies.

2. Require all agencies to report their language capacity and reorganize published lists of approved agencies so that they are separated into language categories, e.g. English only; English/Spanish; and Other (specify).

3. Issue a determination that because adequate counseling is not available to LEP debtors, counseling requirements are waived for them pursuant to 11 U.S.C. §§ 109(h)(2), 727(a)(11) and 1328(g)(2). In the alternative, EOUST could agree to provide free, qualified interpreters for debtors as well as translation of written materials needed for the courses.

4. Require that UST's provide active assistance to LEP debtors when they encounter language barriers created by EOUST and cease moving for dismissal or denial of discharge when LEP debtors do not take credit counseling and financial management courses which are not accessible to them.

5. Publicize the changes in the counseling approval process and notify the public that EOUST will ensure that the bankruptcy education courses will be made accessible to LEP debtors or waived.

6. Update the Language Assistance Plan for EOUST so that is covers all operations nationwide and make the plan available to the public. Make other changes as needed, provide training, public notice and vigorous monitoring of staff and counseling agencies to ensure that language access is provided nationwide in the services that are provided or overseen by EOUST and UST.

We would welcome the opportunity to meet with you to discuss urgent remedial action. We would be glad to assemble a volunteer committee to work with staff of both of your offices to implement these changes. Please direct communications to Paul M. Uyehara of CLS at 215-981-3718 or puyehara@clsphila.org.

Thank you for your consideration.

Sincerely,

CATHERINE C. CARR
Executive Director

PAUL M. UYEHARA
Staff Attorney

On behalf of the following organizations:

Arab American Action Network,
Chicago, IL

Asian American Justice Center
Washington, DC

Asian American Legal Defense and
Education Fund
New York, NY

Asian American Resource Workshop
Boston, MA

Asian Law Caucus
San Francisco, CA

Asian Pacific American Agenda Coalition
Boston, MA

Asian Pacific American Legal Center of
Southern California
Los Angeles, CA

Boat People SOS, Inc.
Falls Church, VA

Brennan Center for Justice at NYU School of Law
New York, NY

Center for Economic Progress
Chicago, IL

Center for Responsible Lending
Durham, NC

Chinese for Affirmative Action
San Francisco, CA

Community Legal Services Inc.
Philadelphia, PA

Congreso de Latinos Unidos, Inc.
Philadelphia, PA

Consumer Bankruptcy Assistance Project
Philadelphia, PA

Consumer Federation of America
Washington, DC

Consumers Union of U.S., Inc.
Yonkers, NY

El Comité de Apoyo a Los Trabajadores Agricolas (CATA), the Farmworker Support Committee
Glassboro, NJ & Kennett Square, PA

Hispanic National Bar Association
Washington, DC

Japanese American Citizens League
San Francisco, CA

Law Center for Families
Oakland, CA

Lawyers' Committee for Civil Rights Under Law
Washington, DC

Mexican American Legal Defense and Educational Fund
Los Angeles, CA

National Asian Pacific American Bar Association
Washington, DC

National Association of Consumer Advocates
Washington, DC

National Association of Consumer Bankruptcy Attorneys
Washington, DC

National Association of Judiciary Interpreters and Translators
Seattle, WA

National Consumer Law Center
Boston, MA

National Council of La Raza
Washington, DC

National Health Law Program
Los Angeles, CA

National Immigration Law Center
Los Angeles, CA

Neighborhood Economic Development Advocacy Project
New York, NY

Pennsylvania Immigration and Citizenship Coalition
Philadelphia, PA

The Sikh Coalition
New York, NY

South Asian American Leaders of Tomorrow
Silver Spring, MD

Southeast Asian Mutual Assistance Associations Coalition
Philadelphia, PA

Voces Sin Fronteras/
Voices Without Borders, Inc.
Wilmington, DE

cc:
Members, Congressional Hispanic Caucus
Members, Congressional Asian Pacific American Caucus
Members, U.S. Senate Judiciary Subcommittee on Administrative Oversight and the Courts
Members, U.S. House Judiciary Subcommittee on Commercial and Administrative Law

Ms. SÁNCHEZ. Thank you, all of you, for your testimony.

We will now begin our questioning, and I will begin by recognizing myself for 5 minutes.

Judge Cristol, you cite numerous examples in which the program focuses on debtor abuses while ignoring creditor abuses. On the other hand, you note in your written testimony that neutrality has actually been maintained in North Carolina and Alabama.

Can you explain the probable causes of that?

Judge CRISTOL [continuing]. Those that have been excluded from the U.S. Trustee Program or the Department of Justice, they are operated by the judiciary, and they seem to operate very well and impartially, without what I regretfully say appears to be politicized input from Washington.

Ms. SÁNCHEZ. Thank you.

Ms. Powers, you stated in your testimony that during your time with the program, and I am quoting you here, "little focus or training emphasized creditor abuse" while you were employed there.

Why do you think the program isn't focused on creditor abuse?

Ms. POWERS. Admittedly, it is a complex law and for the UST to get up to speed in terms of its oversight and its enforcement responsibilities, it was all encompassing.

So in fairness to the U.S. Trustee, it would have been difficult during that particular time to do much else except to get acquainted with the new law. But even before the new law, it seemed as though the order of the day was debtor abuse that the training focused on.

Ms. SÁNCHEZ. There is often a phrase that is used—and that could happen in a whole lot of ways——

I think, to use your own words from your testimony, that there was micromanaging and bureaucracy going on, but why?

Ms. POWERS. I am not really certain. Again, in defense of the United States Trustee's Office, I think there was a lot of attempts to get up to speed with the new law and to have some uniform policies.

So I believe that the application and the mean test and so forth was an obviously important focus.

Ms. SÁNCHEZ. In your opinion, do you think that maybe there was an overemphasis on that—other things that could have gone on?

Ms. POWERS. Well, realistically, though, that was a major overhaul of the law. So maybe it would have been nice to focus on other things, but there really probably wasn't simply enough time.

What I thought was problematic with the micromanaging aspect was the fact that I really felt as though the judgment of the individuals in the field offices, the people that understood their communities, it didn't seem as though that really mattered. I felt that that was my biggest problem with that.

Ms. SÁNCHEZ. Mr. Uyehara, you stated in your testimony that the program used aggressive and wasteful questioning of debtors at creditors' meetings and brought dismissal of consumer bankruptcy cases for minor alleged errors or defects.

Let me ask you, why do you think the program is using those practices?

Mr. UYEHARA. Again, Madam Chairwoman, I think this goes back to the approach that is being taken—the problem that exists in the bankruptcy system investigating fraud on behalf of the debtors, when, in fact, that is not really a problem in the system today.

There are lots of papers that have to be filled out. It is possible to make mistakes, but it is not mistakes that are only made on one side of the game. Mistakes are made on both sides of the game.

I think the point is that the system needs to be policed in a neutral way for all the parties.

Ms. SÁNCHEZ. Do you think that the sort of overzealousness with which they are scrutinizing paperwork, for minor errors, single versus divorced—I am divorced. I certainly consider myself single, because I have been divorced for a number of years, and if I were asked to check that off on a form, I am sure that I would put single. Do you think that that is a case of focusing on very miniscule problems—that should better focus on, perhaps, creditor abuses?

Mr. UYEHARA. Yes. I know it is one of many examples listed in the written testimony gathered by the national membership. It does illustrate situations where questions are being asked that are insignificant. Money is being expended when a trustee requires a debtor or threatens a debtor that papers have to be re-filed to correct insignificant information, in some cases, that is entirely correct to begin with.

That person is either going to stumble through it, if they are unrepresented, and if they do have an attorney, they are going to have to pay their attorney money that they can't afford to pay, for no purpose.

Ms. SÁNCHEZ. Thank you. My time has expired.

So I will now recognize the Ranking Member for his questions.

Mr. CANNON. Thank you, Madam Chair.

I was a little surprised when Judge Cristol started talking about the dogs, and I realized that I hadn't read the title of today's hearing, which is whether we have a watch dog or an attack dog.

I suppose that is a conclusion one has before one comes into a hearing like this.

I wanted to thank Mr. Wedoff for his work on the rules. I think that we started with a difficult program. We have implemented rules. There have been a lot of changes. And the focus here ought to be have we gotten to the point where this is working, so that we don't have these anecdotes like little old ladies wetting themselves because they were interrogated too aggressively.

This is not about anecdotes. This is about how the whole system is working. And I will tell you that in the process, I was Chairman of this Committee for 4 years while we developed this program and trying to get it passed, and I was terrified of what it would do, until I found myself on an airplane with a trustee who was very interesting.

He talked about how these things in the bill. So when I realized who he was, I asked him, "How do you think it will actually work in practice," and we spent 4 hours talking about how it could be implemented.

And I think, Mr. Wedoff, what you have done is the kind of implementation that he was talking about—and I suspect with as many trustees——

But my question now is—I think the bill had the ability to be implemented. We have had 2 years after passage to implement it. And how are we doing? Not are there people that have problems or defects or maybe an individual here or there who overreached and who criticized or who required a re-filing of the documents because of a distinction between being single and being divorced.

Those don't seem to me to be very important to this Committee. What seems to me to be important to this Committee is how are these things actually working prospectively.

And let me direct a question to Mr. White and Mr. Wedoff. In your experience, and recognizing I am not talking about those situations where maybe somebody got up off the wrong side of the bed, or had too strong a cup of coffee or not enough coffee and, therefore, was a little rough in his interrogation. Do we have systems that are implementing the intention of the act, which is to balance the problem of people who use their credit cards in anticipation of bankruptcy perhaps,as opposed to people who have bankruptcy because they have the kinds of problems that Judge Cristol talked about, who tend to be honest people who have a problem in their lives?

Is the system—and I expect we are going to see it from a couple different perspectives, but, Mr. White and Mr. Wedoff, could you give us an idea of how the system has evolved and is it actually working?

Mr. White?

Mr. WHITE. Yes, Mr. Cannon. I think that the systems are in place to implement the statute in an effective way. Now, it is going to be some period of time before we have enough to data to know what ultimate impacts are, of course.

But to turn to just a couple of the major areas where we do have some interim data—I am sorry, sir.

Mr. CANNON. And what you are seeing is that it is an iterative process. You are going back and looking and looking and trying to improve it. I take it that is the essence of what you are saying.

Mr. WHITE. We absolutely are doing that. So for example, in some data that I tried to reflect in the testimony, when we look at the means testing system, we look to see not only are we filing motions, but, also, how are we exercising discretion in the aggregate.

The proof is in the pudding. I cannot answer anecdotes that I don't have personal knowledge of that I am hearing about for the first time and it was a field operation of 1,300 people and 750,000 cases. I can't guarantee you that there was nothing done that shouldn't have been done better.

But I think we are doing a good job, and one indication is if you look at the fact that almost one out of every three cases that, under statutory formula, is presumed abusive, we stand down and don't file a motion because we find that there were special circumstances.

So we have tried to take the discretion Congress has given us so that we bring only meritorious cases.

Credit counseling, which has received some attention, I recall at the last hearing where I appeared, at a general oversight for this Subcommittee, there was a lot of concern with regard to protecting

debtors and, in part, because we all knew that the credit counseling industry was a troubled industry.

Congress, for example, conducted numerous hearings, finding abuses. So the last thing we wanted to do was to have the justice department give an imprimatur, an approval, of credit counselors who would then scam the very debtors they were designed to assist.

So what have we found? The Government Accountability Office gave us a very favorable report last April with regard to the fact that we had an effective screening mechanism. It also helped identify a future research agenda so we can continue to look at outcomes and results.

Also, though, in that report, it looked at limited English proficient debtors and are we making progress in addressing those needs and gave the U.S. Trustee Program very high marks.

So virtually every indicator I can see now, we continue to need to reevaluate what we are doing at all times. We need to look at the data. We need to conduct oversight of what we are actually doing in the field on a day-to-day basis.

But when you stand back and you look at the forest through the trees, you see that there are systems in place, there are reasonable mechanisms, and the horror stories with regard to means testing and the terrible effects, we have ameliorated, I think, those concerns a great deal and also with credit counseling.

I could go down a number of other areas, as well. And I would also just mention, not to take up all of your time, but in chapter 11, we have substantial responsibilities with business reorganization cases where we have enforced the law vigorously there, too, sought independent examiners, trustees, to oust management in cases where there is suspected wrongdoing and we have been very aggressive in enforcing those provisions, as well, all of which make demands on our resources.

So I would suggest that the people of the U.S. Trustee Program deserve a pat on the back for the job that they have done particularly in the field to make the system work. It was a Herculean effort and we have had substantial success.

Ms. SÁNCHEZ. The time of the gentleman has expired, but I will allow Judge Wedoff to respond. If you could do so briefly, I would appreciate it.

Judge WEDOFF. I think I can, Madam Chairwoman.

The question really has two parts. One is, are we implementing effectively the law that is in place right now and, secondly, is the law that is in place right now the best we can do in bankruptcy?

I think, as a judge, my responsibility is primarily in the first area, and I am proud of the work that the rules committee did. With the help of the U.S. Trustee Program, I think we have a set of rules and forms to implement that really is true to the spirit of that legislation and what it was attempting to do, while still having a workable formula, a workable program.

I think that bankruptcy is still a possibility for people who genuinely need it. Whether we can have a better system, Representative Cannon, I have to tell you, I came up, with Judge Tom Small, with a number of suggestions that might be able to be more effective——

I still think there are ways it could be more effective, but, again, my role as a judge is to interpret the law and apply it as it is written, not as I wish it were.

Mr. CANNON. May I just comment, Madam Chair, that the ability to create rules in an iterative process is much simpler than the ability to actually create legislation, with many different interests.

Thank you and I yield back.

Ms. SÁNCHEZ. Thank you.

At this time, I would like to recognize the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you.

Mr. CANNON. Would the gentleman yield? Because the gentleman is attacking the process that I was——

Mr. JOHNSON. I would yield.

Mr. CANNON. I thank the gentleman. There are certainly credit card companies that have interests, but the purpose of—this is a bipartisan bill that was an attempt to solve problems. It was an attempt to create an environment where people who are poor could have access to credit at the lowest cost.

Mr. JOHNSON. Reclaiming my time. It was a very punitive response to a problem that did not exist. There was no fraud. And consumers were already being protected by existing laws in effect at that time.

So to the extent that it was bipartisan, I have to blame both parties——

But at any rate, I want to ask, Mr. White, according to your testimony, approximately what percent of consumer cases are ultimately dismissed for abuse under the new means testing criteria? Does this mean that, well, less than 1 percent of chapter 7 cases are dismissed for abuse, even though proponents of these reforms claim that that percent was going to be ten times higher?

Please explain the differences.

Mr. WHITE. Well, I don't know that I can give you a definitive answer at this point, but based on the data that we do have, we have exercised restraint, as I said, with regard to declining 30 percent of all cases that are presumed abusive under the statutory formula, because there are special circumstances and Congress told us we could exercise that discretion.

Nonetheless, we are filing motions to dismiss per 1,000 cases at a higher level than pre-BAPCPA, which would seem to suggest that the objective standard in the new statute does allow us to identify abusive cases, while, at the same time, giving us discretion to stand down when bringing a case to dismiss would not be the appropriate thing to do.

Also, what is done in the statute here is that for the first time, you have, instead of the old objective standard of substantial abuse, you have a more objective standard. What we cannot get measured, Mr. Johnson, is to what extent having an objective transparent standard, everyone filing bankruptcy should know whether they will be presumed abusive and potential consequences of that objective finding, we don't know how many then decide not to file bankruptcy versus selection of chapter 13 instead of 7.

So there are a whole constellation of factors that are at play. It is interesting, too, at that the hearing 18 months ago or so, the

question was, "What draconian results are we going to have because of mean testing?" Now, the question I often receive at seminars or where I go is, "Does it make a difference?" There is not enough of a change. There aren't enough percentage of debtors being dismissed.

But it is just kind of interesting how the arguments go full circle. So what we try to do in the program is just look objectively at what the data suggest.

Very important to us, Congress gave us discretion. We would respectfully suggest that we are exercising that discretion and continue to need to exercise the oversight and make sure we are exercising the proper discretion.

More cases are being identified under the means test than before, but we are also standing down on one out of every three cases.

Ms. SÁNCHEZ. The time of the gentleman has expired. And I think there is sufficient interest that we will move to a second round of questioning.

So I will recognize myself for 5 minutes.

I would just remind Mr. White, in the talk about statistics and numbers in the aggregate, those are made up of individual cases. So I would suggest that experiences that real debtors experience in going through the process do matter, and I just ask you to keep that in mind.

But the question that I wanted to ask was to Judge Wedoff. My favorite professor in law school would teach us law through cases, and at the end of each piece that we would write, he used to ask us two questions, and I think you have identified at least one of those questions when you were answering Mr. Cannon's question.

He used to ask us, "Is this a good law," and, I think, if I am hearing your testimony correctly, you think this law is good and that there could perhaps be some room for improvement prior to the enactment of the amendment.

But the second follow-up question that he used to ask us, which I think was the more important question oftentimes, was, "Is this a fair law?"

So the question I want to ask you is, approximately how many times has the United States Trustee, in the last 6 years, brought an action in your court for sanctions against an abusive action by a creditor or a creditor's attorney? And you can give me ballpark figures.

Judge WEDOFF. I can't remember.

Ms. SÁNCHEZ. You have no recollection, or you have no ballpark figure whatsoever?

Judge WEDOFF. But I think it is important to keep in mind that the statute directors the U.S. Trustee Program to investigate debtors——

Ms. SÁNCHEZ. I understand and that is part of the point that I am trying to make here.

Judge WEDOFF. I think that the——

Ms. SÁNCHEZ. I was going to say, conversely, approximately how many times, in the same period of time, has the United States Trustee brought an action in your court for sanctions against a debtor or counsel for a debtor?

Judge WEDOFF. Not a huge number, but there have been some.

Ms. SÁNCHEZ. Okay. And that is precisely—you have helped me make my point. The point is if we are going to have a law, whether it is a good law, perhaps not the best law, but a good law, we need to implement it in a way that is fair and evenhanded.

And I think what I am hearing in some of the experience that Judge Cristol is talking about and some of the examples that Mr. Uyehara gave in his testimony is that perhaps there has been this huge focus on debtor abuse and the opposite side of that question is not being asked, which is—or not being addressed——

Mr. CANNON. Would the Chair yield?

Ms. SÁNCHEZ. In a moment, Mr. Cannon. I would like to finish my thought, which is are creditors being pursued as aggressively as debtors are.

And I would suggest that one prime example is in the mortgage lending business and we have seen the meltdown that has occurred with these subprime loans and debtors trying to seek relief from having their homes foreclosed, but some of the changes to the law don't allow families to be able to save their homes.

And there are instances in which there was very little information or misleading information when they entered into these mortgages. And I am not blaming the mortgage crisis on the bankruptcy crisis. I am simply trying to say that if bankruptcy is, in theory, this process by which the honest debtor who has fallen on hard times or perhaps even been taken advantage by predatory lenders or unscrupulous creditors, are we building—have we built, with the amendments to bankruptcy, a system in which these honest debtors are not allowing their debts to be discharged and they are being put through a process that, if you will, traumatizes them again and again and perhaps in ways that don't exactly inure to the public benefit or the public interest or to the idea of the fundamental principal of giving these debtors a fresh start.

That was the conclusion of my thought. I do have one more question that I would like to ask Mr. Uyehara.

Mr. Cannon?

Mr. CANNON. Why don't you go ahead? I will just raise the issue when I have the time.

Ms. SÁNCHEZ. I appreciate that, Mr. Cannon.

Mr. Uyehara, based on your extensive experience in dealing with language issues in courts, how hard would it be for the UST to provide translation services at creditor meetings? Because that seems to be a big problem.

Mr. UYEHARA. Not hard at all. I filed a complaint against the U.S. Trustee in Philadelphia in 2003. I expected the problem to be resolved not only in Philadelphia, but across the country within a matter of months.

It is now 2007 and I am hoping that Director White is going to be giving us some positive developments very soon. But the process that is involved in providing language services to debtors at 341 meetings is really very straightforward.

Ms. SÁNCHEZ. And do you think it is fundamentally fair that a debtor who may not have great control of the English language is forced to attend these meetings when they don't have an idea of what is happening to them?

Mr. UYEHARA. I think it is clearly unfair to the debtor and also not fair to trustees who are concerned about getting accurate answers to questions that are posed.

When you are encouraging debtors to proceed to testify without fully understanding the questions in a way in which they can't fully answer the questions, or to rely on interpreters who are unprofessional and lack language skills of their own and have to be present in the meeting or relative to, what have you, is just a prescription for trouble.

Ms. SÁNCHEZ. Thank you. With that, my time has expired.

I will recognize Mr. Cannon for 5 minutes.

Mr. CANNON. Thank you. I just want to pursue this issue that Mr. Johnson raised and try and get it clear.

The Bankruptcy Act is about people getting discharged from their debts in various forms, and yet the question has come up about how creditors are censored, and there is a way, I think, to do that in bankruptcy, but it seems to me it is not even a primary responsibility of the trustee, and I think that is what Mr. Wedoff was suggesting.

Perhaps you could help me, Madam Chair, in understanding what it is you would like the trustees to do or what the responsibility is in the law that they haven't addressed or what we need to do to the law to give them a context for addressing——

Ms. SÁNCHEZ. If the gentleman would yield.

I didn't mean to suggest that I, for one, have the answer—the topic of today's hearing, if debtors are being aggressively pursued, it seems to me that the flipside of that also needs to be addressed at some point, which is the abuses on the part of the creditors.

Mr. CANNON. Reclaiming my time.

I think this is a difficult issue with a balance in there. It is not a Democrat or Republican issue, it is not a Conservative or a Liberal issue.

Ms. SÁNCHEZ. I would agree.

Mr. CANNON. It is an issue where you have to balance and I think, in this regard, we have actually done a fairly good job, and I appreciate Mr. Wedoff's response, also Mr. White's response.

On the other hand, there are issues here that we are dealing with, as you pointed out, in another environment, although we can deal with it in the bankruptcy context, where you have the subprime lending. I think it is fair to say, scams, people who are clearly not competent to make repayments on loans that were going to accelerate the way they have done, and that is an important issue, but I think separate from the purpose of what we are doing here.

And without prolonging this hearing much, let me just point out that in a bankruptcy hearing, we have a tool that we make available to debtors to clean up their lives and get on. That is different from a criminal environment where a person could go to jail if he doesn't have the right kind of interpreter.

So while I am sensitive to the need for appropriate interpretation and, in fact, in the case of Mr. Petit-Louis, you had a person whose primary language is Creole, who lives in Florida, where you don't have many Creole translators, is my guess. That is difficult and a

problem, I think Mr. Uyehara has made it clear that there is something that doesn't work very well about that.

But the obligation that we have here as Federal legislators I don't think is to provide interpreters, but to hope that in the implementation of the act, reason and judgment are used so that people—so we get the best outcome.

I don't know that we want—in fact, I would suggest that we don't want to make it a very burdensome responsibility on the trustees to have a requirement to interpret, when it is, in fact, as Mr. Uyehara just pointed out, sometimes difficult, if you have got a relative who is not adequate in language. What, are we going to require certified interpreters?

And I think the gentlelady——

Ms. SÁNCHEZ. While it is true this is not the criminal context in which somebody's liberty is at stake, somebody's livelihood or all their earthly possessions or even what little property or anything that they may possess is at stake.

And so I do think it is compelling when you have Government action that people who are caught up in the legal system——

Mr. CANNON. Reclaiming my time.

Ms. SÁNCHEZ [continuing]. Have an understanding of what is happening to them.

Mr. CANNON. Is the gentlelady suggesting that we should have the requirement that the Federal Government pay for interpreters in all cases of bankruptcy of people who don't speak primarily English?

Ms. SÁNCHEZ. I am not suggesting that. I am suggesting that it is a problem that Mr. Uyehara has identified and that clearly is a problem in search of a solution. And I am not going to be the one to suggest what the best solution is, but it is certainly a problem that he has raised and is awaiting some kind of response, because to date that hasn't been addressed.

Mr. CANNON. I agree with the gentlelady of the problem. I don't think it is one that we resolve at our level.

But I do have another question, so reclaiming my time.

I wanted to ask this the first time, and I apologize for not getting to it. But in your opinion, the opinion of those of you here on the panel, are the trustees being paid enough or do we need to raise that rate?

Mr. WHITE. Mr. Cannon, if you are referring to the private trustees, the chapter 7 trustees, they have not received an increase in what is called the no assets fee of $60 from those cases in a number of years and, in principal, we concur that it would be appropriate for them to receive an increase.

The difficulty is how do you achieve that while not endorsing any specific proposal. But consistent with our position in the past, in principal, we concur it would be appropriate to raise their pay.

Mr. CANNON. Thank you. And, Madam Chair, would you indulge the others of the panel who might have an opinion on that?

Ms. SÁNCHEZ. If they can be brief.

Judge WEDOFF. I served as a panel trustee when I only got $15. I enjoyed the work, but it was a charitable contribution. My partners thought I would maybe give it up. I understand the trustees

are asking for $80 instead of $60, which I think is very reasonable, but still not enough, and I would highly endorse the increase.

Ms. SÁNCHEZ. Ms. Powers?

Ms. POWERS. I would endorse it, as well.

Ms. SÁNCHEZ. Thank you.

Judge CRISTOL. I believe the trustees are very substantially underpaid for the amount of work that they are required to do under the law, but I also sympathize with the need not to increase the filing fees for debtors.

Ms. SÁNCHEZ. Mr. Uyehara?

Mr. UYEHARA. Madam Chair, unfortunately, I am afraid I am not prepared to answer that question.

As a career legal services attorney, we could use a pay raise, too.

Ms. SÁNCHEZ. Thank you.

Mr. CANNON. Thank you for indulging me, Madam Chair, and I yield back.

Ms. SÁNCHEZ. At this time, I will recognize the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON [continuing]. And that amount has not been adjusted for several years, essentially.

Mr. WHITE. That is correct.

Mr. JOHNSON. And then with the passage of the 2005 act, it placed additional obligations and responsibilities upon the trustees for the same amount of compensation. Is that correct?

Mr. WHITE. That is correct.

Mr. JOHNSON. They have got to monitor the means testing, got to do all of that additional paperwork, and got to monitor audits, and got to approve the credit counseling agencies and oversee all of that. So it is definitely more responsibility on the trustees now.

Since the 2005 Act—has there been an increased number of pro se filers or filers who are not paying the filing fee, in other words? Has it increased or has it decreased?

Mr. WHITE. Most of the responsibilities that you outlined are carried out by the U.S. Trustees Program, the credit counseling oversight and so forth, and we are Federal employees.

Some of the verification of income that goes into the means test, some of that is done by private trustees, but many of the core responsibilities under statute depend on the U.S. Trustee.

Mr. JOHNSON. Most of it is done by those trustees that are hired by the——

Mr. WHITE. The private trustees do administer the cases, but if you are talking about the change in workload, BAPCPA, the new statute, in fact, did provide more responsibilities, and we have worked with them very closely to——

Mr. JOHNSON. But they haven't received more money.

Mr. WHITE. I absolutely agree with that point. That point is correct. I was just trying to clarify with regard to division of responsibility.

Mr. JOHNSON. Has the number of pro se debtors that pay those fees, have those increased or decreased?

Mr. WHITE. For the first time, Mr. Johnson, if your question is to what we refer to as IFP debtors, for the first time, what BAPCPA did is it allowed debtors without means to have the filing fee waived and to pay nothing.

So we don't have comparative data, because before the bankruptcy reform law, everyone had to pay the filing fee. The data that I do have show that about 1.8 percent of all of the filers get IFP status, meaning the filing fee is waived, and there is a mechanism in the reform law so that if a debtor seeks to have the fee waived, then they need to establish certain facts, the inability to pay, before the bankruptcy judge.

Mr. JOHNSON. Let me state this, also. In the northern district of Georgia, in the hearing rooms where they have the 341 meetings with the creditors, posters, prominently—you will be prosecuted, this, that and the other.

And in light of threats of possible criminal prosecution, should the U.S. Trustee Program provide translation services at creditors meetings to debtors who can't speak English? I know that this has already been answered, but I want it answered within that context.

Mr. WHITE. We try to address that and continuing to in a phased way.

Mr. JOHNSON. Yes or no? My time is running out.

Mr. WHITE. We are addressing, and we are planning to do more to address it, and I could go into more detail. I am not willing to make a legal judgment with regard to the extent of the obligation, but we have a lot of progress we have made that I would be happy to provide to you.

Mr. JOHNSON. It sounds like you are saying yes——

Ms. SÁNCHEZ. I am sorry, but your time has expired.

If there is no objection, I am going to move on.

Judge CRISTOL. The U.S. Trustee has made major steps forward in the area of increasing availability of translators, interpreters, and I commend them for that and they are getting better in that area. And of course, in the Little Louis case and the other cases, my concern is the aggressiveness with which they pursue these uneven confrontations. And that is where I think they appeal to compassionate conservatives and bring some compassion or to apply justice tempered with mercy in the performance of their duties, because I think that they are too much caught up in the spirit of the bankruptcy abuse, which was the presumption before it was passed, and the misnomer of consumer protection, they meant consumer persecution.

Ms. POWERS. My feeling is that the U.S. Trustee is attempting to make efforts to make sure that people are accommodated in that way.

Judge WEDOFF. The system will work better. A more accurate answer, they will be better understood, but the problem is the one that Mr. Cannon pointed out of somebody paying for it.

I think it would be ideal if you could make translator services available at every 341 meeting for every debtor who requested it. I don't know if there is funding available to do that.

I would be delighted if there were.

Mr. UYEHARA. If I could just clarify, and partly in response to Representative Cannon's comments earlier, the situation currently is that there is existing Federal policy in the form of Executive Order 13166, which requires Federal agencies, including the justice department, to ensure that people who don't speak English well are able to obtain meaningful access to Federal Government programs.

The situation of the meeting of creditors and bankruptcy counseling classes are clearly within the scope of the executive order and really within the scope of guidance issued by the justice department.

The EOUST itself, in response to a complaint filed, issued a plan on what they were going to do to attack this problem 3 years ago, for which they had made a commitment to provide interpreters nationally at all meetings of creditors to the extent reasonably possible.

By this time, in other words, by last month, they should have been reporting on their progress on rolling this out nationally.

So it is not so much a question of whether it is upheld by Federal statute, but it is a question that is required by executive order and in justice department policy, as well as policy in UST programs.

So the other problem is that in the context of bankruptcy counseling and what Judge Cristol was referring to, people would understand there are counseling agencies out there. We don't have the capacity in particular languages. We are not going to force you to go to a class that you cannot understand and cannot participate in.

Instead, what they did is they said, "We don't dispute that you cannot take counseling in Creole, but you didn't do it, the law required it and you are not permitted to come into bankruptcy court unless you do that first."

That attitude and that overly aggressive posture violates their own policy. It is insulting and should be insulting not only to the debtor bar, but to everyone that is concerned about the fair administration of the law.

Ms. SÁNCHEZ. Thank you. The time of the gentleman has expired.

I would like to thank the witnesses for their testimony today. Without objection, Members will have 5 legislative days to submit any additional written questions, which we will forward to the witnesses, and we will ask that you complete them as promptly as possible so that they can be made a part of the record, as well.

Without objection, the record will remain open for 5 legislative days for the submission of any other material.

Again, I want to thank everybody for their time and their patience.

This hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 2:27 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

RESPONSE TO QUESTIONS SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ, CHAIRPERSON, SUBCOMMITTEE ON COMMERCIAL AND ADMINSITRATIVE LAW TO CLIFFORD J. WHITE, III, DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, UNITED STATES DEPARTMENT OF JUSTICE

ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216
(202) 225-3951

August 22, 2007

Clifford J. White, III, Director
Executive Office for United States Trustees
United States Department of Justice
20 Massachusetts Avenue, N.W., Room 8000
Washington, D.C. 20530

Dear Mr. White:

As part of the Subcommittee's continuing oversight of the United States Trustee Program, I request that you please respond to the enclosed questions. Your responses will help us prepare for an anticipated oversight hearing on the Program. Accordingly, I would appreciate receiving your written responses by September 11, 2007.

Thank you for your kind attention to this request.

Sincerely,

LINDA T. SÁNCHEZ
Chair
Subcommittee on Commercial and Administrative Law

LTS:sjl
Enclosure
cc: The Honorable Chris B. Cannon, Ranking Member

1. Please provide a breakdown of all motions filed by the United States Trustee Program (USTP) pursuant to 11 U.S.C. § 707(b) by type, district, and disposition for calendar year 2006.

2. Based on available statistics for calendar year 2006, what percentage of debtors had below median income?

3. Based on available statistics for calendar year 2006, how many cases were identified as being presumed to be abusive of those debtors with above median income?

4. Please state how many audits pursuant to section 603 of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) have been performed to date.

    a. Please set forth the outcome of each of these audits.

5. Please provide copies of all contracts that the USTP has entered into with entities to perform audits of individual debtors pursuant to 28 U.S.C. § 586(f).

    a. Were these contracts competitively bid? Please explain.

6. What guidance, if any, is given to auditors concerning factors that constitute a material misstatement pursuant to 11 U.S.C. § 727(d)(4)(A)?

7. What guidance, if any, is given to auditors concerning whether an item requested for an audit is "necessary" pursuant to 11 U.S.C. § 727(d)(4)(B)?

8. What guidance is given to auditors, if any, about the amount of a time and cost burden that can reasonably be placed upon debtors in cases that are audited?

    a. Has the USTP estimated a debtor's costs, including attorney's fees, of complying with an audit?

9. How many section 341 meetings held in chapter 7 cases did USTP personnel attend in March 2004 and how many did they attend in March 2007?

    a. For each of these months, in how many of these cases where USTP personnel attended the section 341 meeting did the USTP subsequently move to dismiss or convert the case or seek denial of the debtor's discharge?

10. For calendar year 2006, please state how many actions were commenced by the USTP that concerned veracity, accuracy or sufficiency of creditor stay relief motions or proofs of claim in consumer cases.

    a. Please provide the disposition of each of these actions.

11. How many non-attorney bankruptcy analysts have been hired by the USTP since the enactment of BAPCPA?

    a. What is the total annual cost, including benefits and overhead, of all non-attorney bankruptcy analysts employed by the USTP?

12. According to page 1 of the EOUST Report to Congress: Criminal Referrals by the United States Trustee Program Fiscal Year 2006, dated June 2007, (Criminal Referral Report), the number of criminal referrals made during fiscal year 2006 represented a 24% increase over the number of criminal referrals made during fiscal year 2005.

    a. Please explain the basis for this increase.

13. According to pages 1 and 5 of the Criminal Referral Report, of 925 criminal referrals made in fiscal year 2006, 234 of the referrals were declined for prosecution.

    a. Please explain why these referrals were declined for prosecution.

    b. Please provide a breakdown by crime categories the referrals that were declined for prosecution.

14. The Criminal Referral Report notes on page 9 that the USTP has, in conjunction with the National Institute of Justice, selected RAND Corporation to conduct an independent study on the nature and prevalence of fraud, abuse, and error in the bankruptcy system."

    a. When will this study be available?

    b. Did the RAND Corporation receive any compensation from the USTP or Justice Department to conduct this study?

    c. If so, please state the amount and source of any such compensation.

    d. Did the RAND Corporation receive any compensation from a private source to conduct this study?

    e. If so, please state the amount and source of any such compensation.

15. According to page 1 of the EOUST Report to Congress: Impact of the Utilization of Internal Revenue Standards for Determining Expenses on Debtors and the Court, dated July 2007, (IRS Standards Report), "EOUST contracted with the RAND Corporation to analyze the effect on debtors and the courts of using the IRS Standards."

    a. Did the RAND Corporation receive any compensation from the USTP or Justice Department to conduct this study?

b. If so, please state the amount and source of any such compensation.

16. According to footnote 2 of the IRS Standards Report, the "USTP conducted an independent external peer review of RAND's draft report."

a. Please identify who conducted the independent review.

17. On page 3 of the IRS Standards Report, it is noted that the IRS Standards "impact a relatively small proportion of bankruptcy filers" and that the proportion of affected filers "varies greatly from state to state." In light of the fact that this Report cites the complexity presented by the utilization of the IRS Standards, their limited, yet disparate impact, and divergent interpretation of them by the courts, would you recommend another system for assessing whether a consumer debtor's filing constitutes an abuse?

a. If yes, please explain.

b. If not, please explain.

18. Please describe with whom did the USTP meet before formulating its credit counseling procedures.

a. To this end, please indicate how many times the USTP met with each individual or entity.

19. Please describe what other contacts the USTP had with individuals or entities before formulating its credit counseling procedures.

a. To this end, please include telephone conversations, fax transmissions and email communications.

20. Please provide the number of chapter 7 cases that were administered in which the unencumbered amount of assets administered by trustees was less than $3,000 for each of the last three calendar years

a. For these cases, what was the average percentage of assets paid for administrative costs and what was the average percentage of the total dischargeable unsecured debt paid in such cases?

21. For March 2004 and March 2007, respectively, please state the total amounts distributed to general unsecured creditors in chapter 7 asset cases and the average percentage of distribution.

22. Please state the total personnel costs of the EOUST including the costs of personnel ordinarily stationed elsewhere, but detailed to performing duties in the EOUST's Washington, DC office for calendar years 2004 and 2006.

a. Please state the total cost of personnel ordinarily stationed elsewhere, but detailed to perform duties in the EOUST's Washington, DC office for calendar years 2004 and 2006.

b. Please identify by name, title, and term of all personnel ordinarily stationed elsewhere, but detailed to perform duties in the EOUST's Washington, DC over the period of January 1, 2004 through to the present.

23. In 2003, a debtor and the Consumer Bankruptcy Assistance Project filed a complaint against the United States Trustee for Region III for refusing to provide an interpreter for the Cambodian speaking debtor at her section 341 meeting. Further complaints were made to EOUST about this problem. Thereafter, 37 consumer, immigrant, civil rights and ethnic organizations submitted a letter to the United States Trustee in May 2006.

a. Please provide a copy of any responses to the 2003 complaint, the follow-up complaints to the EOUST, and the May 2006 letter.

24. Does the USTP contemplate establishing a uniform program that, for example, would facilitate the provision of interpreters for non-English speaking debtors during the section 341 meeting?

25. Has the USTP undertaken any studies on the impact of its policies on the cost of bankruptcy to consumer debtors?

a. If so, please provide copies of such studies.

26. Has the USTP undertaken any cost/benefit analyses of the cost to debtors who cannot obtain bankruptcy relief suffering continued collection harassment, loss of property, marital problems, and health effects resulting from the stress of their financial problems?

a. If so, please provide copies of such analyses.

RESPONSES TO QUESTIONS FROM CONGRESSWOMAN SANCHEZ
(August 22, 2007 Letter to the Executive Office for U.S. Trustees)

1. Please provide a breakdown of all motions filed by the United States Trustee Program (USTP) pursuant to 11 U.S.C. § 707(b) by type, district, and disposition for calendar year 2006.

Exhibit 1 provides a listing of all motions filed by the United States Trustee Program (Program or USTP) pursuant to 11 U.S.C. § 707(b) by type and district, along with disposition data, for calendar year 2006. It is important to note that the disposition information for 2006 is not directly comparable to motions filed in that year because motions are not always resolved in the year they are filed. Therefore, outcomes reported for calendar year 2006 may be the result of motions initiated in the previous calendar year. Similarly, outcomes for some of the motions filed in calendar year 2006 may not be recorded until calendar year 2007.

2. Based on available statistics for calendar year 2006, what percentage of debtors had below median income?

Based on available data for calendar year 2006, 91 percent of non-business chapter 7 debtors had income below their state median income. We do not routinely collect income data on chapter 13 debtors; however, a study conducted by the RAND Corporation ("Evaluation of the Effects of Using IRS Expense Standards to Calculate a Debtor's Monthly Disposable Income") found that 73 percent of chapter 13 debtors had below median income. That study was based on 800 chapter 13 debtors who filed between April and December 2006.

3. Based on available statistics for calendar year 2006, how many cases were identified as being presumed to be abusive of those debtors with above median income?

Based on available data for calendar year 2006, 2,768, or 10.6 percent, of non-business chapter 7 debtors with income above their state median were presumed abusive.

4. Please state how many audits pursuant to section 603 of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) have been performed to date.

There have been 2,447 audit assignments concluded as of August 22, 2007. Of this number, 233 resulted in a "Report of No Audit" because the audit firm determined that the audit could not be completed. Possible reasons for being unable to complete an audit include that the debtor did not respond to the audit notification letter, the debtor did not provide a sufficient response to the audit firm's request for information, or the case was dismissed before a sufficient response was received.

a. Please set forth the outcome of each of these audits.

The chart below provides a breakdown of cases selected for audit and the outcomes for concluded audits through August 22, 2007. There are three potential outcomes for a debtor audit: (1) no material misstatements reported, (2) at least one material misstatement reported, or (3) issuance of a report of no audit.

CASES SELECTED FOR DEBTOR AUDIT AND AUDIT OUTCOMES
(Reports Filed Through August 22, 2007)

Audit Activity	Random[1/]	Exception[2/]	Total
Cases Selected for Audit	2,357	895	3,252
Outcomes of Concluded Audits	1,749	698	2,447
– *No Material Misstatements Reported*	1,154	398	1,552
– *At Least One Material Misstatement Reported*	430	232	662
– *Report of No Audit*	165	68	233
Cases in Process	608	197	805

[1/] Random audits are based on selection criteria to ensure at least 1 out of 250 cases per judicial district.
[2/] Exception audits are selected from cases where the income or expenses of the debtor exceed the statistical norm.

Source: United States Trustee Program, Department of Justice (Excludes North Carolina and Alabama)

5. Please provide copies of all contracts that the USTP has entered into with entities to perform audits of individual debtors pursuant to 28 U.S.C. § 586(f).

The USTP awarded contracts to six vendors to perform debtor audits in each of the defined geographical areas. Copies of the delivery orders are provided at Exhibit 2. (Please note that the attachments to the delivery orders were current at the time of issuance, but may have since been modified.)

a. Were these contracts competitively bid? Please explain.

Yes. Solicitation, Request for Quotation, DOJ-UST-06-007, was issued to 47 GSA Schedule vendors on April 25, 2006. Quotations were due by close of business on May 31, 2006. Nineteen vendors responded with a technical and cost proposal. Each of the 19 technical proposals was evaluated by a USTP panel consisting of two attorneys, two senior bankruptcy

analysts, and one Certified Public Accountant. The competition and contract awards were made in accordance with the Federal Acquisition Regulations.

6. What guidance, if any, is given to auditors concerning factors that constitute a material misstatement pursuant to 11 U.S.C. § 727(d)(4)(A)?

In August 2006, the Executive Office for United States Trustees (EOUST) conducted a day long training seminar for staff of the audit firms, and also hosted two training sessions via video teleconference (VTC) in October 2006 and January 2007. During each of these training sessions, staff of the audit firms had an opportunity to ask questions on a wide range of topics, including material misstatements and documents/information necessary in the debtor audit process. In addition, audit firms regularly seek and are provided guidance from the EOUST on a wide-range of issues. For those issues raised that are germane to debtor audits in general or are an area of interest for others, the EOUST will share its responses with all audit firms.

The threshold bases for what constitutes a material misstatement for purposes of 11 U.S.C. § 727(d)(4)(A), has not been published to preserve the integrity of the audit process and to minimize the risk that data filed with the court might be manipulated to evade audit scrutiny. Audit firms are required to notify debtor's counsel, or the unrepresented debtor, in writing if a material misstatement will be included in a report of audit so that the debtor has an opportunity to provide a written explanation for the item(s) in question within seven days from the date of the audit firm's notification letter.

7. What guidance, if any, is given to auditors concerning whether an item requested is "necessary" pursuant to 11 U.S.C. § 727(d)(4)(B)?

The training and follow-up discussed in question 6 above is responsive to this question as well. Minimum record requirements have been established as part of the audit protocol process. Audit firms are provided with the following guidance regarding minimum records requirements for issuing a report of audit:

> If there is a deficiency in only one financial document category of the document request, i.e., payment advices, federal tax returns, account statements (and not the divorce decree), and there is complete compliance in the other two financial document categories, then the auditor can complete an audit. However, the debtor must meet a specified minimum compliance in the deficient category.
>
> In the tax return category, a return for one year is sufficient if the pay advices and account statements for six months pre-petition are received. In the pay advice or financial statement categories, 60 days pre-petition production will suffice if six

months of advices/statements are received in the other category and two years of federal tax returns are provided.

If the minimum records requirements are not satisfied, the audit firm issues a report of no audit. The documents requested and the minimum records required to issue a report of audit may be periodically adjusted and refined based upon experience. For example, the document request which accompanies the letter mailed to debtor's counsel, or unrepresented debtors whose cases are selected for audit, was modified in May 2007 to reduce the detail required in connection with the production of account statements.

8. What guidance is given to auditors, if any, about the time and cost burden that can reasonably be placed upon debtors in cases that are audited.

Again, the training and follow-up discussed in the answer to question 6 above is responsive to this question as well. The USTP established the following policies and procedures which are designed to reduce the time and cost burden associated with cases that are selected for audit.

- Debtor audits are desk audits conducted in the audit firm's office. There are no site visits and the audit firm does not meet with debtor's counsel or the debtor whose case is selected for audit.
- Debtor's counsel may authorize the audit firm to communicate directly with the debtor to obtain the documents necessary to complete the audit by executing a form titled "Instructions to Audit Firm Regarding Communications with Debtors," a copy of which is provided at Exhibit 3.
- The audit firm may allow the debtor additional time to provide requested information.
- A form affidavit/declaration document is provided to debtors' counsel and unrepresented debtors to support a claim of non-ownership with respect to property identified in the audit as being owned by the debtor.
- Most audit firm communications with debtor's counsel are conducted via email, reducing costs and the inefficiency associated with missed calls and telephone messages, as well as costs associated with more formal written correspondence.
- The audit firm may accept a partial response from the debtor to one or more categories of the audit document request if the debtor provides a full response to the other document request categories.

- The documents requested and the minimum records required to issue a report of audit has been periodically adjusted and refined based upon experience. For example, as noted in the response to question 7, the document request which accompanies the letter mailed to debtors' counsel, or unrepresented debtors whose cases are selected for audit, was modified in May 2007 to reduce the detail required in connection with the production of account statements.

9. How many section 341 meetings held in chapter 7 cases did USTP personnel attend in March 2004 and how many did they attend in March 2007?

We do not systematically collect data on staff attendance at section 341 meetings.

a. For each of these months, in how many of these cases where USTP personnel attended the section 341 meeting did the USTP subsequently move to dismiss or convert the case or seek denial of the debtor's discharge?

Since we do not systematically collect data on staff attendance at section 341 meetings, we are unable to provide reliable information on the number of motions filed that are attributable to our participation in meetings. It is important to note that USTP personnel attend section 341 meetings for a variety of purposes including to monitor trustee performance, to determine if "special circumstances" exist which debtor's counsel failed to point out, and to identify abusive creditor conduct.

10. For calendar year 2006, please state how many actions were commenced by the USTP that concerned veracity, accuracy or sufficiency of creditor stay relief motions or proofs of claims.

In calendar year 2006, 33 motions and 19 inquiries were initiated which related to false and inaccurate claims, discharge or stay violations under 11 U.S.C. § 524, or abuse of reaffirmation procedures.

The USTP takes seriously its responsibility to aggressively investigate and take appropriate actions against creditors who abuse the bankruptcy system, particularly when the abuse is systemic or multi-jurisdictional. In many cases, creditor abuse is best addressed by the private case trustees we appoint who object to claims or by debtor's lawyers who dispute loan agreement terms. But sometimes, the integrity of the system as a whole is at stake and it is important for the United States Trustee Program to take direct enforcement action.

Among the most recent significant cases we have litigated to redress creditor abuse are two in the Southern District of Texas pertaining to the veracity and accuracy of relief from stay motions. In *In re Allen*, counsel for the secured lender filed an erroneous objection to

confirmation in a chapter 13 case. After the debtor notified the law firm of the error, it responded with a similarly erroneous notice of withdrawal of the objection, inaccurately stating that the debtor had filed an amended chapter 13 plan. Testimony revealed that the law firm's pleadings are computer-generated and they receive little or no attorney review. In its opinion, which assessed a sanction against creditor's counsel, the court noted that the law firm "has complained bitterly about the participation of the U.S. Trustee in this matter . . . [The United States Trustee's] participation assured presentation of a complete factual and legal case . . . **The U.S. Trustee provided an invaluable benefit to the case and to the process by his professional participation**." 2007 WL 1747018, slip op. at 3, n.5 (Bankr. S.D. Tex. 2007) (emphasis added).

In *In re Parsley*, Case No. 05-90374 (Bankr. S.D. Tex. 2007), still pending in the Southern District of Texas, the United States Trustee is litigating against two law firms and a national mortgage lender and servicer. The Program deployed seasoned litigators from the Executive Office and other offices throughout the country to conduct discovery involving 20 witnesses and nearly 10,000 pages of documents. The court recently heard a week of testimony, and additional hearing dates have been scheduled.

Since the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), we have reached out to many constituencies in the bankruptcy system to identify areas where our enforcement actions with regard to creditor abuse could add the most value to protect debtors and the integrity of the bankruptcy system. For example, we have met on several occasions with numerous consumer debtor advocates, including the leadership of the National Association of Consumer Bankruptcy Attorneys. Additionally, at our most recent regularly scheduled meeting of the United States Trustees, we heard a presentation from a law professor who is completing a study commissioned by the National Conference of Bankruptcy Judges on mortgage industry practices in bankruptcy cases. We are hopeful that these and other outreach efforts will continue to inform our discussion and practices in this important area.

a. Please provide the disposition of each of these actions.

In calendar year 2006, there were 25 successful motions and 11 successful inquiries reported which related to false and inaccurate claims, discharge or stay violations under 11 U.S.C. § 524, or abuse of reaffirmation procedures. It is important to note that the disposition information for 2006 is not directly comparable to motions filed and inquires made in that same year because these matters are not always resolved within the same year. Therefore, the outcomes reported for calendar year 2006 may be the result of motions or inquiries initiated in the previous calendar year. Similarly, the outcomes for some of the motions filed and inquiries made in calendar year 2006 may not be recorded until calendar year 2007.

11. How many non-attorney bankruptcy analysts have been hired by the USTP since the enactment of BAPCPA?

From April 15, 2005, through August 26, 2007, the USTP has hired 35 bankruptcy analysts. Of this total, 17 analysts were hired to fill positions authorized to implement the BAPCPA and 18 were hired to fill existing vacancies. Three of the new bankruptcy analysts hired also have law degrees; however, in accordance with Program and Department rules, bankruptcy analysts with law degrees are not allowed to practice law or to represent the Program in court. They are hired for their financial and accounting expertise and the law degree is incidental to their employment with the USTP.

a. What is the total annual cost, including benefits and overhead, of all non-attorney bankruptcy analysts employed by the USTP?

As of August 27, 2007, the USTP employed 236 bankruptcy analysts. Eleven of those analysts also have a law degree. Because bankruptcy analysts with law degrees are not permitted to perform the duties of an attorney, our annual cost calculation for bankruptcy analysts does not separate out the benefits and overhead for the 11 analysts with a law degree.

On an annual basis, the cost, including salary, benefits and overhead, for the 236 bankruptcy analysts is estimated at $42,357,511. The total cost was calculated using the actual annual salary for each of the USTP bankruptcy analysts on board as of August 27, 2007, and an average cost for benefits (e.g., health insurance) and overhead.

12. According to page 1 of the EOUST Report to Congress: Criminal Referrals by the United States Trustee Program Fiscal Year 2006, dated June 2007, (Criminal Referral Report), the number of criminal referrals made during fiscal year 2006 represented a 24% increase over the number of criminal referrals made during fiscal year 2005.

a. Please explain the basis for this increase.

The 24 percent increase in criminal referrals between fiscal years 2005 and 2006 is due to the Program's enhanced efforts and continued focus in this important area. It follows on a 12 percent increase between fiscal years 2004 and 2005. These accomplishments were spearheaded by the Program's Criminal Enforcement Unit (CrEU), which oversees and coordinates the Program's national criminal enforcement efforts. The CrEU, consisting primarily of experienced federal prosecutors, serves as a resource for Program personnel throughout the referral process, beginning with the detection of possible criminal misconduct and continuing through the drafting and making of criminal referrals to U.S. Attorney's offices and law enforcement agencies.

During FY 2006, the CrEU took several steps to enhance the Program's criminal enforcement efforts. This included publishing internal resource documents and a training video

for use by Program personnel involved in the criminal referral process; assisting Program personnel with the drafting of referrals and addressing other issues relevant to the criminal referral process; and providing extensive bankruptcy fraud training to Program personnel and chapters 7 and 13 trustees on the detection of common bankruptcy fraud and related schemes.

Additionally, the Program, in coordination with our partners in the U.S. Attorney and law enforcement communities, developed an enforcement initiative in FY 2006 that was announced in early FY 2007 as "Operation Truth or Consequences." Operation Truth or Consequences resulted in the Department of Justice charging 78 defendants in 69 separate prosecutions in 36 judicial districts around the country. Many of the cases included in the Operation were a result of referrals made in FY 2006.

Finally, there are approximately 25 USTP trial attorneys designated as Special Assistant United States Attorneys to assist in the investigation and prosecution of the Program's bankruptcy fraud referrals.

13. According to pages 1 and 5 of the Criminal Referral Report, of 925 criminal referrals made in fiscal year 2006, 234 of the referrals were declined for prosecution.

a. Please explain why these referrals were declined for prosecution.

Although we do track declinations in the Program's Criminal Enforcement Tracking System, our offices generally do not track the investigatory or prosecutory reasons for a declination decision. Standards for declinations are guided by the "Principles of Federal Prosecution" as outlined in the United States Attorneys' Manual 9-27.000.

b. Please provide a breakdown by crime categories [for] the referrals that were declined for prosecution.

The chart below provides a breakdown of the allegations contained within the 234 referrals declined for prosecution as of December 31, 2006. The five most common allegations in the declined referrals are the same five most common allegations in the 925 referrals made in FY 2006 (as reflected in Table 1 of the Criminal Report, Criminal Referrals by Type of Allegation, page 3).

TYPE OF ALLEGATION	NUMBER OF REFERRALS DECLINED
False Oaths/Statements [18 U.S.C. § 152(2) & (3)]	120
Concealment of Assets	92
Bankruptcy Fraud Scheme [18 U.S.C. § 157]	75
Perjury/False Statement	67

TYPE OF ALLEGATION	NUMBER OF REFERRALS DECLINED
ID Theft/Use of False/Multiple SSNs	39
Forged Documents	22
Tax Fraud [26 U.S.C. § 7201, et seq.]	21
Concealment of Documents [18 U.S.C. § 152(8) & (9)]	15
Credit Card Fraud/Bust-Outs	8
Embezzlement [18 U.S.C. § 153]	7
Mail/Wire Fraud [18 U.S.C. § 1341 & 1343]	7
Post-Petition Receipt of Property [18 U.S.C. § 152(5)]	7
False Claim [18 U.S.C. § 152(4)]	6
Mortgage/Real Estate Fraud	5
Sarbanes-Oxley [18 U.S.C. § 1519]	4
Serial Filer	5
Obstruction of Justice	3
Bank Fraud [18 U.S.C. § 1344]	2
Corporate Bust-Outs/Bleed-Outs	2
Criminal Contempt	2
Threat of Violence	2
Antitrust	1
Bribery [18 U.S.C. § 152(6)]	1
Federal Program Fraud	1
Immigration Violation	1
Professional Fraud	1
State Law Violations	1
* One referral often contains more than one allegation, so the sum of the referrals declined exceeds 234.	

14. The Criminal Referral Report notes on page 9 that the USTP has, in conjunction with the National Institute of Justice, selected RAND Corporation to conduct an independent study on the nature and prevalence of fraud, abuse, and error in the bankruptcy system.

a. When will this study be available?

The RAND report was posted to the Program's Web site on September 6, 2007.

b. Did the RAND Corporation receive any compensation from the USTP or Justice Department to conduct this study?

Yes. The study was funded by the USTP through the National Institute of Justice.

c. If so, please state the amount and source of any such compensation.

The study cost was $200,000, which was paid through the National Institute of Justice from the USTP's FY 2004 and 2005 appropriations.

d. Did the RAND Corporation receive any compensation from a private source to conduct this study?

RAND has confirmed that it did not receive any compensation from a private source to conduct this study.

e. If so, please state the amount and source of any such compensation.

See response to 14d.

15. According to page 1 of the EOUST Report to Congress: Impact of the Utilization of Internal Revenue Standards for Determining Expenses on Debtors and the Court, dated July, 2007, (IRS Standards Report), "EOUST contracted with the RAND Corporation to analyze the effect on debtors and the courts of using the IRS Standards."

a. Did the RAND Corporation receive any compensation from the USTP or Justice Department to conduct this study?

Yes. The study was funded by the USTP. Solicitation, Request for Quotation, DOJ-UST-06-0010, was issued to five firms from the GSA Federal Supply Schedule contract. Only RAND responded with a technical and cost proposal. The contract was awarded to RAND, consistent with the Federal Acquisition Regulations.

b. If so, please state the amount and source of any such compensation.

The contract award amount was $299,039.30. The funding source was the USTP's FY 2006 appropriation.

16. According to footnote 2 of the IRS Standards Report, the "USTP conducted an independent external peer review of RAND's draft report.

a. Please identify who conducted the independent review.

The USTP has begun to assemble a pool of reviewers to provide an independent review of USTP studies and reports. The pool of reviewers includes academics, as well as public and private sector bankruptcy practitioners with backgrounds in debtor and creditor law. In addition, reviewers with expertise in areas such as research methods and financial education are used when appropriate.

For the IRS Standards Report, the USTP selected six reviewers from this pool who encompassed a wide-range of perspectives from the bankruptcy community. The reviewers included two bankruptcy law professors, a managing partner of a law firm that represents creditors, a representative of the American Bankruptcy Institute, a standing chapter 13 trustee, and a United States Trustee. Additionally, to ensure there was appropriate expertise on the study from the outset, at the USTP's request, RAND included two law professors with expertise in debtor-creditor relations on its study team, and they were also noted as co-authors of the final report. Further, a third professor with a background in consumer law assisted RAND staff in the technical review of the report.

The peer review process helps ensure the quality and integrity of information disseminated by the USTP, and also ensures that reports clearly present methods, analyses, and conclusions that may be shared directly with a diverse audience, such as policymakers, practitioners, and academics. The use of peer reviewers to ensure quality reporting is recognized as an important tool in the dissemination of information. Government agencies and scientific journals follow a longstanding practice of not disclosing the identity of individual reviewers on a particular grant proposal or manuscript. Providing anonymity helps to ensure that critiques are free from professional, public, and political influences. As a result, USTP is concerned that revealing the names of the reviewers could have a chilling effect on both the recruitment and objectivity of the reviewers and may adversely impact our ability to ensure future public reports are of a high quality.

17. On page 3 of the IRS Standards Report, it is noted that the IRS Standards "impact a relatively small proportion of bankruptcy filers" and that the proportion of affected filers "varies greatly from state to state." In light of the fact that this Report cites the complexity presented by the utilization of the IRS Standards, their limited, yet disparate impact, and divergent interpretation of them by the courts, would you recommend another system for assessing whether a consumer debtor's filing constitutes an abuse?

a. If yes, please explain.

b. If no, please explain.

At this time, we have no specific recommendations regarding alternatives to using the IRS expense standards for certain expense categories in calculating the means test for above-median income debtors. Greater passage of time will be required to assess the long-term effects of the statutory changes.

18. Please describe with whom did the USTP meet before formulating its credit counseling procedures.

Because the USTP did not have experience or expertise in the credit counseling area, we sought input from a wide variety of stakeholders in formulating our procedures, including state and federal agencies, credit counseling industry organizations, consumer advocates, and creditor groups. Within a very limited time frame, we successfully set up an infrastructure, established guidance and an application process, and approved an adequate number of providers sufficiently in advance of the effective date for individuals to be able to obtain service in every judicial district under our jurisdiction. This assertion is supported in the report of the Government Accountability Office to the Congress on the Program's implementation of the credit counseling provisions of the statute. At the current time, there are 161 approved credit counseling agencies.

This has been an evolving process for us and we have continued to solicit input and feedback on our activities and to make adjustments as appropriate. In July 2006, we published an Interim Final Rule and, after considering the 22 comments received, expect to publish a Proposed Notice of Final Rulemaking in the near future. Additionally, at our request, the National Institute of Justice sponsored research conducted by the RAND Corporation to assist the USTP in examining what constitutes effective pre-bankruptcy credit counseling and how it can be measured. RAND recently issued its technical report which we will use to inform our future activities.

a. To this end, please indicate how many times the USTP met with each individual or entity.

The Program consulted on a number of occasions with representatives of a variety of stakeholders, including federal and state agencies, the National Foundation for Credit

Counseling, the Association of Independent Consumer Credit Counseling Agencies, the American Association of Debt Management Organizations, the Surety Association of America, the Consumer Federation of America, the National Consumer Law Center, and the National Association of Consumer Bankruptcy Attorneys, as well as credit counseling agencies and creditor groups. Provided at Exhibit 4 is a listing of known contacts outside of the federal government. Since the Program does not maintain a central calendar or call log of meetings and contacts, the listing is based on a review of extant records and responses from staff. It does, however, capture contacts as far back as 2001, when a version of the credit counseling provisions similar to those included in the BAPCPA was being considered and the USTP conducted a great deal of preliminary research.

19. Please describe what other contacts the USTP had with individuals or entities before formulating its credit counseling procedures.

a. To this end, please include telephone conversations, fax transmissions and email communications.

Please see the answer to question 18 above and Exhibit 4, which are responsive to this question as well.

20. Please provide the number of chapter 7 cases that were administered in which the unencumbered amount of assets administered by trustees was less than $3,000 for each of the last three calendar years.

The Program's chapter 7 data collection system does not differentiate between receipts from unencumbered versus encumbered assets. Provided below is a chart showing the number of cases with gross receipts of less than $3,000 that were closed in calendar years 2004 through 2006.

Calendar Year	Chapter 7 Cases Closed with Less than $3,000 in Gross Receipts	Percentage of All Cases Closed
2004	18,477	38%
2005	21,169	39%
2006	26,274	39%

a. For these cases, what was the average percentage of assets paid for administrative costs and what was the average percentage of the total dischargeable unsecured debt paid in such cases?

The table below identifies the percentage of assets paid for administrative costs in calendars years 2004 through 2006 for cases in which gross receipts were less than $3,000. Administrative costs include chapter 7 trustee compensation, attorney fees and expenses, other professional fees and expenses, and other administrative and prior chapter costs.

		Dollar Breakdown of Administrative Expenses				
CY	**% of Assets Paid for Admin. Costs**	**Trustee Comp.**	**Attorney Fees**	**Other Prof. Fees**	**Other Admin. and Prior Chapter Expenses**	**Total**
2004	33%	$8,360,952	$1,220,647	$254,488	$1,767,857	$11,603,944
2005	32%	$9,468,218	$1,355,658	$212,580	$1,813,679	$12,850,135
2006	32%	$11,612,380	$1,543,455	$260,752	$2,097,339	$15,513,926

The Program's chapter 7 data collection system does not capture unsecured debt that is discharged; therefore, we are not able to provide the average percentage of total dischargeable unsecured debt paid. However, as reflected in the following chart, we are able to provide the percentage of distribution to priority unsecured and general unsecured creditors in calendars years 2004 through 2006 for cases in which gross receipts were less than $3,000.

		Dollar Breakdown of Distributions to Creditors		
CY	**% of Assets Paid to Priority and General Unsecured Creditors**	**Priority Unsecured**	**General Unsecured**	**Total**
2004	63%	$20,971,755	$1,111,852	$22,083,607
2005	64%	$24,016,451	$1,278,816	$25,295,266
2006	64%	$29,573,444	$1,697,494	$31,270,938

Under the BAPCPA, the USTP is required to issue uniform final reports, and two of the new elements that will be captured are distributions to claimants and claims discharged without payment. We have initiated the rulemaking process to make these forms effective. Unfortunately, unless the courts adopt the data-enabled form standard we have requested for

these reports and other related documents (or, in the alternative, a Case Upload option which we proposed), compiling the data will be a major challenge for the case trustees.

21. For March 2004 and March 2007, respectively, please state the total amounts distributed to general unsecured creditors in chapter 7 cases and the average percentage of distribution.

Chapter 7 distribution data collected by the Program are based on the date of case closure, not the date of distribution. For cases reported as closed in March 2004, total distributions to general unsecured creditors were $43,300,365, which represents 31 percent of assets administered. Distribution data is collected on a semi-annual basis from our field offices. Data for the period January 1, 2007, through June 30, 2007, has just recently been submitted and verification of the data has not yet been completed.

For purposes of determining potential differences pre- and post-BAPCPA, we are providing data for December 2004 and December 2006 (the last month post-BAPCPA where we have verified data). For cases reported as closed in December 2004, the total distribution to general unsecured creditors was $38,665,183, which represents 25 percent of assets administered. For cases reported as closed in December 2006, the total distribution to general unsecured creditors was $60,147,272, which represents 28 percent of assets administered.

The five year average of total distributions to general unsecured creditors for cases closed between 2002 and 2006 is 28 percent.

22. Please state the total personnel costs of the EOUST including the costs of personnel ordinarily stationed elsewhere, but detailed to performing duties in the EOUST's Washington, DC office for calendar years 2004 and 2006.

The total personnel cost (salaries and benefits) for staff, including detailees, assigned to the EOUST during calendar year 2004 was $9,245,098; for calendar year 2006, the total cost was $13,706,044. (The salaries and benefits of detailees were prorated to reflect the actual time they spent on detail to the EOUST.)

The USTP utilizes details in a variety of ways to staff its offices and to perform critical functions. The length of time for a detail can vary from several days to several weeks or months. Details were utilized extensively in the implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) to develop policies and procedures, train field office staff, and review applications of credit counseling and debtor education providers. With just six months between the passage of the BAPCPA and the effective date of the majority of its provisions, time was of the essence and, absent immediate funding to staff the Program's new functions, detailees solved workload issues and enabled a seamless integration between the Program's regions and its headquarters in the area of policy development. After the effective date of the Act, details continued to be utilized to staff the Credit Counseling/Debtor Education

Unit until permanent staff could be hired. Without the commitment of the staff detailed to that Unit, the Program would not have been able to carry out its new responsibilities.

At the Executive Office, the Program has used details to fill vacant leadership and senior staff positions. Having talented field personnel come to the Executive Office on a rotational basis and utilizing those talents to lead key offices, including the Office of General Counsel and the Office of Review and Oversight, and fill other senior management positions brings a practical legal perspective to the Program's headquarters operations and provides leadership development opportunities for field personnel.

a. Please state the total cost of personnel ordinarily stationed elsewhere, but detailed to perform duties in the EOUST's Washington, DC office for calendar years 2004 and 2006.

In calendar year 2004, the salary and benefits cost for personnel ordinarily stationed elsewhere who were detailed to perform duties at the EOUST totaled $403,516; for calendar year 2006, this cost totaled $2,161,484.

b. Please identify by name, title, and term of all personnel ordinarily stationed elsewhere, but detailed to perform duties in the EOUST's Washington DC over the period of January 1, 2004 through to the present.

The information on personnel detailed to the EOUST over the period of January 1, 2004, through July 30, 2007, is provided at Exhibit 5. The term of the detail for each employee represents the total number of weeks (not necessarily consecutive) spent at the EOUST.

23. In 2003, a debtor and the Consumer Bankruptcy Assistance Project filed a complaint against the United States Trustee for Region III for refusing to provide an interpreter for the Cambodian speaking debtor at her section 341 meeting. Further complaints were made to EOUST about this problem. Thereafter, 37 consumer, immigrant, civil rights and ethnic organizations submitted a letter to the United States Trustee in May 2006.

a. Please provide a copy of any responses to the 2003 complaint, the follow-up complaints to the EOUST, and the May 2006 letter.

Although there have been no written responses, the EOUST has undertaken a number of measures responsive to the concerns raised in the referenced complaints. With regard to the 2003 case involving the Cambodian speaking debtor, the EOUST did assist the debtor by providing for an interpreter to appear at the section 341 meeting. Additionally, early in 2004, the EOUST coordinated with the Department's Civil Rights Division to develop a plan to address the language assistance needs of debtors appearing at section 341 meetings. As part of that plan, the EOUST undertook a pilot program as a means to develop "best practices" and procedures for the implementation of a language assistance plan in each of the Program's 95 field offices. The

one-year pilot ran from October 1, 2004, through September 30, 2005, in seven U.S. Trustee offices that serve and/or interact with significant limited English proficient communities. The pilot provided the option to debtors of using a tele-interpreter service paid for by the USTP.

The participating offices submitted reports analyzing the impact of the pilot program in their districts. The EOUST reviewed these reports and is preparing a revised language assistance plan which provides for a nationwide phase-in of tele-interpreter services funded by the USTP. Plan implementation has been delayed, in part, due to the cost of adding telephone lines and purchasing conference-quality telephone systems needed to access the tele-interpreter service in the section 341 meeting rooms. There are also issues relating to the physical locations. The USTP holds section 341 meetings in approximately 450 sites throughout the county; however, we control the space in only 180 of those locations. The remaining locations, some of which are located in hotels, are obtained through purchase orders or are received without charge. There are logistical concerns with adding permanent telephone lines in space not controlled by the USTP and securing the conference phones when meeting rooms are not in use. While these issues are being resolved, the USTP has continued to fund the use of the tele-interpreter services in the original pilot districts. In fact, during the month of June 2007, tele-interpreter services were provided in the following 12 languages for 83 section 341 meetings: Spanish, Vietnamese, Arabic, Hmong, Korean, Bosnian (Serb), Laotian, Russian, Turkish, Romanian, Gujarati, and Mandarin. Additionally, the Program's Bankruptcy Information Sheet, which is posted on the USTP Web site and provides general information about what happens in a bankruptcy case, has been translated into Spanish, Vietnamese, French, Chinese, Korean, Hmong, Tagalog, and Arabic. Further, the following forms have been translated and are available in Spanish: "Declaration for Debtors Without an Attorney," "Information and Guidelines on Chapter 7 Cases," "What You Should Know About Your Chapter 13 Case," and "Proof of ID and Social Security Number." We will continue to work with the Civil Rights Division and other stakeholders regarding the provision of services to LEP debtors.

The EOUST has also taken steps to address the concerns of limited English proficient debtors regarding the new credit counseling and debtor education requirements established by the BAPCPA. The Program has approved two national providers that offer interpreter services without charge to their clients in more than 150 languages. In addition, other approved national and local providers offer Internet, telephonic, or in-person counseling in a total of 30 languages. Approved providers are required to report to the Program on their language capabilities, and the USTP Web site provides information on the language capability of all providers on a district-by-district basis.

24. Does the USTP contemplate establishing a uniform program that, for example, would facilitate the provision of interpreters for non-English speaking debtors during the section 341 meeting?

As noted in the answer to question 23 above, the EOUST is currently in the process of finalizing a revised language assistance plan for the Program. The plan, which will be

implemented in stages, will provide for the nationwide use of tele-interpreter services funded by the EOUST.

25. Has the USTP undertaken any studies on the impact of its policies on the cost of bankruptcy to consumer debtors?

The USTP has not conducted any studies on the impact of its policies on the cost of bankruptcy to consumer debtors. The General Accounting Office (GAO) issued a report in April 2007 titled "Value of Credit Counseling Requirement is not Clear" (GAO-07-203). In its report, the GAO concluded that the fees for credit counseling and debtor education appeared reasonable. The report is available on our Web site (http://www.usdoj.gov/ust/).

26. Has the USTP undertaken any cost/benefit analyses of the cost to debtors who cannot obtain bankruptcy relief suffering continued collection harassment, loss of property, marital problems, and health effects resulting from the stress of their problems?

The USTP has not undertaken any cost/benefit analyses in the areas specified.

USTP Motions Filed and Motion Dispositions by Type by District [1]

Calendar Year 2006

Judicial District	707(b)(2)(A) - Presumed Abuse						707(b)(3) - Bad Faith/Totality of Circumstances						Other 707(b) Actions [2]			
	Motion Filed	Voluntarily Converted to Chapter 13	Voluntarily Dismissed	Dismissed by Court after hearing	Motion Denied	Motion With-drawn	Motion Filed	Voluntarily Converted to Chapter 13	Voluntarily Dismissed	Dismissed by Court after hearing	Motion Denied	Motion With-drawn	Motion Filed	Motion Granted	Motion Denied	Motion With-drawn
Alaska		2											12	5	1	2
Arizona	42	7	1	5		5	4			1		1	32	42		12
Arkansas	64	24	10			19	11	2				4	29	12		17
California Central	9	10	1	2			12	1		5		1	124	149	17	50
California Eastern	22	4		8	1	2	1					1	16	14	1	2
California Northern	7	5				1	3	1		1		1	11	11	1	10
California Southern	1					1	1						22	23	1	18
Colorado	121	32	9	3		17	2	3				1	103	83	5	48
Connecticut	6	4		2		1							5	6		
DC	1	1											2	2		
Delaware	13	3	1	1	1	2	5	1	1	1	1	1	14	8		1
Florida Middle	32	15	7	3		3	6	2	2				31	39	1	18
Florida Northern	1	2											12	11		4
Florida Southern	6	2	3			1	2						14	14	1	6
Georgia Middle	8	5	1			2	5						12	12		1
Georgia Northern	88	16	15	1	1	28	2	1	1			2	26	18	2	10
Georgia Southern	2	2											8	14	1	4
Guam																
Hawaii	1	1											10	12		
Idaho	2												4	4	1	
Illinois Northern	14	2	1	4	1		2	1					56	48		16
Indiana Northern	5	1		1			1						17	11		11
Indiana Southern	41	12	2	5		9	2	1					28	36	1	9
Iowa Northern	2				1		4	1		1		1	8	10		4
Iowa Southern	26	10	8	1		7	15	3	6	1		2	13	54		8
Kansas	27	6	6	1			2						15	15	2	4
Kentucky Eastern	14	8	1	1			6	3	1				42	44		9
Kentucky Western	17	2	1		1	1	10	2		1	1		8	11	1	2
Louisiana Eastern	9	3	1	2		1	1						1			
Louisiana Middle													1	1		
Louisiana Western	5	2	3												1	
Maine	7	3				1										

USTP Motions Filed and Motion Dispositions by Type by District [1]

Calendar Year 2006

Judicial District	707(b)(2)(A) - Presumed Abuse						707(b)(3) - Bad Faith/Totality of Circumstances						Other 707(b) Actions [2]			
	Motion Filed	Voluntarily Converted to Chapter 13	Voluntarily Dismissed	Dismissed by Court after hearing	Motion Denied	Motion With-drawn	Motion Filed	Voluntarily Converted to Chapter 13	Voluntarily Dismissed	Dismissed by Court after hearing	Motion Denied	Motion With-drawn	Motion Filed	Motion Granted	Motion Denied	Motion With-drawn
Maryland	3	6					2						27	37		16
Massachusetts	22	8	5	1			9	6		3			72	66		8
Michigan Eastern	78	15	10	8	3	16	117	16	2	13	2	42	23	10	3	16
Michigan Western	45	12		2		4	17	3	3			5	89	92	1	37
Minnesota	75	18	4	10	1	23	5	1				2	29	40		35
Mississippi Northern	4		2			1	2	1				1	7	6		
Mississippi Southern	6	2	1										6	5		1
Missouri Eastern	11	1	1	2		4	3	1				2	20	12		23
Missouri Western	17	4	1	2		7	1						18	19		10
Montana	2	2	1				3		1				1	3		1
Nebraska	50	4		5		11	14	1	1			6	58	44	1	32
Nevada	13	11	2	1		2	3			2			10	28		9
New Hampshire	9	2	1				3		2			1	10	9		
New Jersey	8	2	2	2			2	2		2		1	20	14		4
New Mexico	7		3	1			3		1				9	5		6
New York Eastern	6	1		2			3					1	37	15	1	9
New York Northern	7	6	1	2				1					28	26		5
New York Southern													6	3		
New York Western	18	7	2	3			2	4		1	1		14	14		8
North Dakota	2	2				1	2					1	15	18		4
Northern Mariana Islands																
Ohio Northern	52	11	1	2		9	18	4	1		1	2	13	11	1	12
Ohio Southern	128	44	8	2		33	7	2				1	50	52	1	22
Oklahoma Eastern	7	1	4	1		1							10	10		1
Oklahoma Northern	7	3	1	2		1	2						8	9		2
Oklahoma Western	23	2	7	2		2							28	14	2	15
Oregon	38	14	2	1		5	25	10	1	2		4	65	67		20
Pennsylvania Eastern	11	4		1		2	4	2				1	13	19		5
Pennsylvania Middle	19	10		2		3	20	9	1	1	1	4	48	42	1	13
Pennsylvania Western	26	14	3	3		1	1	1					42	46		1
Puerto Rico		2					2	1		1			20	22		4
Rhode Island	1						1							2		1

USTP Motions Filed and Motion Dispositions by Type by District [1]

Calendar Year 2006

Judicial District	707(b)(2)(A) - Presumed Abuse						707(b)(3) - Bad Faith/Totality of Circumstances						Other 707(b) Actions [2]			
	Motion Filed	Voluntarily Converted to Chapter 13	Voluntarily Dismissed	Dismissed by Court after hearing	Motion Denied	Motion With-drawn	Motion Filed	Voluntarily Converted to Chapter 13	Voluntarily Dismissed	Dismissed by Court after hearing	Motion Denied	Motion With-drawn	Motion Filed	Motion Granted	Motion Denied	Motion With-drawn
South Carolina	3	1					1			1			4	3		1
South Dakota	6	4	2			1	2	1		1			8	17		4
Tennessee Eastern	7	2	1	2			2					1				
Tennessee Middle	43	13	2	2		9	6	1		1			5	4		5
Tennessee Western	9	4	1	1		1	1						12	16		5
Texas Eastern	32	10	4	1		10	12	4	2	1		4	35	26	2	9
Texas Northern	49	16	8	5		14	7	1	4			3	21	25		5
Texas Southern	46	17	7	7		6	16	2	1	2		2	68	63		21
Texas Western	46	11	6	6	2	16	10	3		3		3	14	14	1	4
Utah	46	11	4	5		4	25	3	3	4		3	59	35		29
Vermont													1	4		
Virgin Islands																
Virginia Eastern	5	3	1			2	1						8	6		4
Virginia Western	5	1	1				2						44	40	12	37
Washington Eastern	12	6				2	8	1				1	39	34		43
Washington Western	19	5	1	2		7	4	1		1			7	8		5
West Virginia Northern	4	3												3		7
West Virginia Southern	9	5	2			2							3	14		32
Wisconsin Eastern	13	6	1			1	7			1	4		7	9	4	1
Wisconsin Western	22	1	2			2	1						14	17		6
Wyoming	5	1	1			1							1	4		1
(District Not Specified)	34	21	2	1		4							12	13		2
Total	**1705**	**533**	**179**	**129**	**12**	**309**	**473**	**104**	**34**	**51**	**11**	**106**	**1834**	**1822**	**67**	**807**

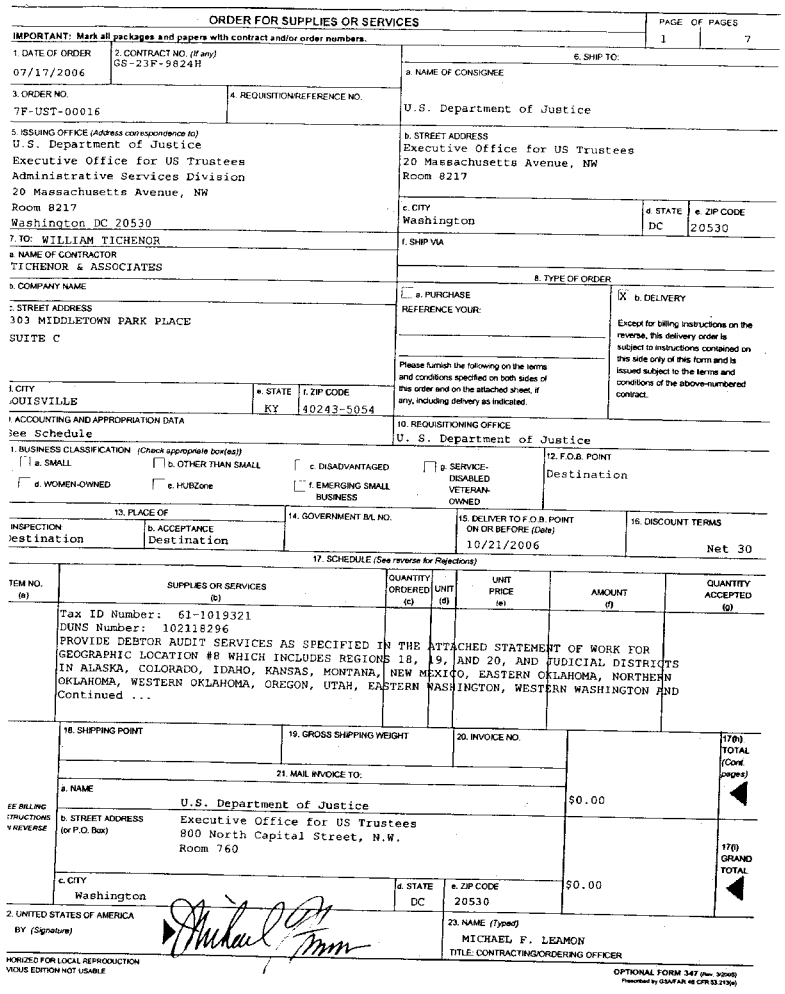
Notes:

[1] Some outcomes may be the result of motions filed in the previous calendar year. In turn, the outcomes for some of the motions filed in calendar year 2006 will not be recorded until calendar year 2007.

[2] Other represents motions and dispositions on cases filed pre-BAPCPA. Conversion and dismissal dispositions were not record pre-BAPCPA.

Source: United States Trustee Program, Department of Justice (Excludes North Carolina and Alabama)

EXHIBIT 2



ORDER FOR SUPPLIES OR SERVICES

PAGE OF PAGES: 1 | 7

IMPORTANT: Mark all packages and papers with contract and/or order numbers.

1. DATE OF ORDER: 07/17/2006
2. CONTRACT NO. (If any): GS-23F-9824H
3. ORDER NO.: 7F-UST-00016
4. REQUISITION/REFERENCE NO.:

5. ISSUING OFFICE (Address correspondence to):
U.S. Department of Justice
Executive Office for US Trustees
Administrative Services Division
20 Massachusetts Avenue, NW
Room 8217
Washington DC 20530

6. SHIP TO:
a. NAME OF CONSIGNEE: U.S. Department of Justice
b. STREET ADDRESS: Executive Office for US Trustees
20 Massachusetts Avenue, NW
Room 8217
c. CITY: Washington | d. STATE: DC | e. ZIP CODE: 20530
f. SHIP VIA:

7. TO: WILLIAM TICHENOR
a. NAME OF CONTRACTOR: TICHENOR & ASSOCIATES
b. COMPANY NAME:
c. STREET ADDRESS: 303 MIDDLETOWN PARK PLACE
SUITE C
d. CITY: LOUISVILLE | e. STATE: KY | f. ZIP CODE: 40243-5054

8. TYPE OF ORDER
a. PURCHASE — REFERENCE YOUR:
Please furnish the following on the terms and conditions specified on both sides of this order and on the attached sheet, if any, including delivery as indicated.
[X] b. DELIVERY
Except for billing instructions on the reverse, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.

9. ACCOUNTING AND APPROPRIATION DATA: See Schedule
10. REQUISITIONING OFFICE: U. S. Department of Justice

11. BUSINESS CLASSIFICATION (Check appropriate box(es))
[ ] a. SMALL [ ] b. OTHER THAN SMALL [ ] c. DISADVANTAGED [ ] g. SERVICE-DISABLED VETERAN-OWNED
[ ] d. WOMEN-OWNED [ ] e. HUBZone [ ] f. EMERGING SMALL BUSINESS

12. F.O.B. POINT: Destination

13. PLACE OF — a. INSPECTION: Destination | b. ACCEPTANCE: Destination
14. GOVERNMENT B/L NO.:
15. DELIVER TO F.O.B. POINT ON OR BEFORE (Date): 10/21/2006
16. DISCOUNT TERMS: Net 30

17. SCHEDULE (See reverse for Rejections)

ITEM NO. (a)	SUPPLIES OR SERVICES (b)	QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)	QUANTITY ACCEPTED (g)
	Tax ID Number: 61-1019321 DUNS Number: 102118296 PROVIDE DEBTOR AUDIT SERVICES AS SPECIFIED IN THE ATTACHED STATEMENT OF WORK FOR GEOGRAPHIC LOCATION #8 WHICH INCLUDES REGIONS 18, 19, AND 20, AND JUDICIAL DISTRICTS IN ALASKA, COLORADO, IDAHO, KANSAS, MONTANA, NEW MEXICO, EASTERN OKLAHOMA, NORTHERN OKLAHOMA, WESTERN OKLAHOMA, OREGON, UTAH, EASTERN WASHINGTON, WESTERN WASHINGTON AND Continued ...					

18. SHIPPING POINT
19. GROSS SHIPPING WEIGHT
20. INVOICE NO.
17(h) TOTAL (Cont. pages): $0.00

21. MAIL INVOICE TO:
a. NAME: U.S. Department of Justice
b. STREET ADDRESS (or P.O. Box): Executive Office for US Trustees
800 North Capital Street, N.W.
Room 760
c. CITY: Washington | d. STATE: DC | e. ZIP CODE: 20530
17(i) GRAND TOTAL: $0.00

SEE BILLING INSTRUCTIONS ON REVERSE

22. UNITED STATES OF AMERICA
BY (Signature):

23. NAME (Typed): MICHAEL F. LEAMON
TITLE: CONTRACTING/ORDERING OFFICER

AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITION NOT USABLE

OPTIONAL FORM 347 (Rev. 3/2005)
Prescribed by GSA/FAR 48 CFR 53.213(f)

ORDER FOR SUPPLIES OR SERVICES
SCHEDULE - CONTINUATION

PAGE OF PAGES: 2 | 7

IMPORTANT: Mark all packages and papers with contract and/or order numbers.

DATE OF ORDER	CONTRACT NO.	ORDER NO.
07/17/2006	GS-23F-9824H	7F-UST-00016

ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY ORDERED (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)	QUANTITY ACCEPTED (G)
	WYOMING.					
	THIS AWARD IS MADE SUBJECT TO THE AVAILABILITY OF FISCAL YEAR 2007 FUNDING (SEE ATTACHED CLAUSE). ONCE FISCAL YEAR 2007 FUNDING IS AVAILABLE, A MODIFICATION WILL BE ISSUED TO NOTIFY YOU OF THE FUNDED AMOUNT. HOWEVER, FOR THIS GEOGRAPHIC LOCATION, AND THIS PERIOD OF PERFORMANCE, THE TOTAL AMOUNT OF FUNDING IS ESTIMATED TO BE $144,500.00.					
	DETAILED INVOICES SHALL BE SENT MONTHLY AND MUST INCLUDE THE CASE NUMBER, THE NAME OF THE AUDITED PARTY, AND THE TYPE OF AUDIT. IN ADDITION, INVOICES MUST INCLUDE YOUR FEDERAL TAX IDENTIFICATION NUMBER, DATA UNIVERSAL NUMBER SYSTEM (DUNS) NUMBER, YOUR BANKING INFORMATION SUCH AS BANK ROUTING NUMBER (ABA NUMBER), BANK ACCOUNT NUMBER AND BANK ACCOUNT TYPE. ALL INVOICE PAYMENTS WILL BE MADE USING ELECTRONIC FUNDS TRANSFER (EFT).					
	ALL QUESTIONS REGARDING PAYMENT SHOULD BE DIRECTED TO MICHAEL LEAMON AT MICHAEL.LEAMON@USDOJ.GOV, OR BY TELEPHONE ON 202-616-1023, OR BY FAX ON 202-616-1177.					
	Period of Performance: 10/01/2006 to 09/30/2007					
0001	RANDOM AUDITS - ESTIMATED QUANTITY	350	EA	300.00	0.00	
	Accounting Info: 074496; OC: 2537; YREGDOC: 7 01 60016 Amount: $105,000.00 (Subject to Availability of Funds)					
0002	TARGETED AUDITS - ESTIMATED QUANTITY	65	EA	600.00	0.00	
	Accounting Info: 074496; SOC: 2537; YREGDOC: 7 01 60016 Amount: $39,000.00 (Subject to Availability of Funds)					
0003	NO AUDITS - ESTIMATED QUANTITY	10	EA	50.00	0.00	
	Accounting Info: 074496; OC: 2537; YREGDOC: 7 01 60016 Amount: $500.00 (Subject to Availability of Funds)					
	52.232-18 AVAILABILITY OF FUNDS (APR 1984)					
	Funds are not presently available for this contract. The Government's obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.					
	Continued ...					

TOTAL CARRIED FORWARD TO 1ST PAGE (ITEM 17(H))

7540-01-152-8082 | 505-84-101 | OPTIONAL FORM 348 (Rev. 6/95) Prescribed by GSA FAR (48 CFR) 53.215-2

ORDER FOR SUPPLIES OR SERVICES
SCHEDULE - CONTINUATION

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IMPORTANT: Mark all packages and papers with contract and/or order numbers

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ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY ORDERED (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)	QUANTITY ACCEPTED (G)

CONTRACT CLAUSES
FAR 52.252-2 CLAUSES INCORPORATED BY REFERENCE (FEB 1998)

This Contract (Purchase Order) incorporates one or more clauses by reference with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. The clauses applicable to this Contract(Purchase Order) are listed below.

CLAUSE NUMBER | DATE OF CLAUSE | CLAUSE TITLE

___ 52.203-12 Limitation on Payments to Influence Certain Federal Transactions Sep.05
___ 52.204-2 Security Requirements Aug.96
_X_ 52.204-7 Central Contractor Registration Jan.04
___ 52.204-9 Personal Identity Verification of Contractor Personnel Jan.06
___ 52.207-5 Option to Purchase Equipment Feb.95
___ 52.208-9 Contractor Use of Mandatory Sources of Supply Jul.04
___ 52.209-6 Protecting the Govt.'s Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment Jul.95
___ 52.211-5 Material Requirements Aug.00
___ 52.211-11 Liquidated Damages - Supplies, Services, or Research and Development Sep.00
___ 52.211-16 Variation in Quantity Apr.84
___ 52.212-1 Instructions to Offerors - Commercial Items Oct.03
___ 52.212-3 Offeror Reps & Certs Commercial Items May.04
___ 52.212-4 Contract Terms & Conditions Commercial Items Sep.05
___ 52.212-5 Contract Terms & Conditions Required to Implement Statutes or Executive Orders-Commercial Items Apr.06
___ 52.213-2 Invoices Apr.84
___ 52.213-3 Notice to Supplier Apr.84
_X_ 52.213-4 Terms and Conditions - Simplified Acquisitions (Other Than Commercial Items) Oct.03
___ 52.217-2 Cancellation Under Multi-Year Contracts Oct.97
___ 52.217-8 Option to Extend Services Nov.99
___ 52.217-9 Option to Extend the Term of the Contract Mar.00
___ 52.219-5 Very Small Business Set-Aside Jun.03
___ 52.219-6 Notice of Total Small Business Set-Aside Jun.03
___ 52.219-70XX Section 8(a) Direct Award Aug.98
___ 52.222-41 Service Contract Act of 1965, as Amended Jul.05
___ 52.222-42 Statement of Equivalent Rates for Federal Hires May.89
___ 52.222-43 Fair Labor Standards Act & Service Contract Act-Price Adjustment (Multiple) May.89

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ORDER FOR SUPPLIES OR SERVICES
SCHEDULE - CONTINUATION

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IMPORTANT: Mark all packages and papers with contract and/or order numbers

DATE OF ORDER	CONTRACT NO.	ORDER NO.
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ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY ORDERED (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)	QUANTITY ACCEPTED (G)

___ 52.222-48 Exemption from Application of Service Contract Act Provisions Aug.96
___ 52.222-50 Compating Trafficking in Persons Apr. 06
___ 52.223-3 Hazardous Material Identification and Material Safety Data Jan.97
___ 52.223-6 Drug-Free Workplace May. 01
___ 52.223-11 Ozone-Depleting Substances May.01
___ 52.224-1 Privacy Act Notification Apr.84
___ 52.224-2 Privacy Act Apr.84
___ 52.225-3 Buy American Act-North American Free Trade Agreement-Israeli Trade Act Apr.06
___ 52.225-5 Trade Agreements Apr.06
___ 52.225-14 Inconsistency Between English Version and Translation of Contract Feb.00
___ 52.227-14 Rights In Data-General Jun.87
___ 52.232.7 Payments under Time and Materials and Labor Hour Contracts Dec.02
___ 52.232-18 Availability of Funds Apr.84
___ 52.232-23 Assignment of Claims Jan.86
___ 52.232-35 Designation of Office for Government Receipt of Electronic Funds Transfer Information May.99
___ 52.232-36 Payment by Third Party May.99
___ 52.232-37 Multiple Payment Arrangements May.99
_X_ 52.233-4 Applicable Law for Breach of Contract Claim Oct.04
___ 52.237-2 Protection of Gov. Buildings, Equip. and Vegetation Apr.84
___ 52.239-1 Privacy or Security Safeguards Aug.96
___ 52.242-15 Stop Work Order Aug.89
___ 52.242-17 Government Delay of Work Apr.84
___ 52.243-1 Changes-Fixed Price Aug. 87
___ 52.243-1 Changes-Fixed Price (Alternate 1) Apr.84
___ 52.243-3 Changes-Time and Materials or Labor-Hours Sep.00
___ 52.245-2 Government Property (Fixed Price Contracts) May.04
___ 52.245-4 Government Furnished Property (Short Form) Jun.03
___ 52.245-5 Government Property (Cost Reimbursement, Time & Materials or Labor - Hour Contracts) May.04
___ 52.245-9 Use and Charges Aug.05
___ 52.246-6 Inspection Time and Material and Labor Hour May.01
_X_ 52.249-1 Termination for Convenience of the Government (Fixed-Price)(Short Form) Apr.84
___ 52.249-2 Termination for Convenience of the Government - Fixed Price May.04

INVOICE REQUIREMENTS

(a) Invoices shall be prepared and an original submitted to the office address indicated in block 21 of the OF 347 unless otherwise specified herein. To constitute a proper invoice, each invoice shall be annotated with the following information:

(i) The name and Taxpayer Identification Number (TIN) of the business concern and

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ORDER FOR SUPPLIES OR SERVICES
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IMPORTANT: Mark all packages and papers with contract and/or order numbers.

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ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY ORDERED (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)	QUANTITY ACCEPTED (G)

the invoice date; (ii) The data in block 3 of the SF 147 titled 'Order No.'; (iii) A description, price, and the quantity of supplies or services furnished, as well as their associated purchase order line item number(s); (iv) Shipping and payment terms; and (v) The name, title, telephone number and complete mailing address of the responsible official to whom payment is to be sent. (b) To assist the government in making timely payments, the contractor is requested to indicate on the invoice, the period over which services were provided. *The vendor MUST place its Tax Identification Number (TIN) on the invoice. Any invoice that does not have this number will be returned as an improper invoice. (For individuals with no other TIN the Social Security Number should be used). *'In accordance with the requirements of the Debt Collection Act of 1996, Public Law 104-134, it is the intent of the Department of Justice to use your Taxpayer Identification Number for purposes of collecting and reporting on any delinquent amounts arising out of your relationship with the Government.

FAR 52.232-35 Designation of Office for Government Receipt of Electronic Funds Transfer Information (MAY 99)
(c) Designated Office:
U.S. Department of Justice, EOUST
800 North Capital St., NW
Room 760
Washington DC 20530

FAR 52.252-2 Clauses incorporated by Reference (FEB 98) - This order incorporates the following clauses by reference with the same force and effect as if they were given in full text. The Contractor shall complete any required information items below in applicable provisions/clauses and submit this attachment with their quotation. Clauses clearly not applicable by virtue of the nature of the requirement (e.g., the option clause(s) in a requirement without option quantities or periods), are considered self-deleting.

FAR 52.222-41 Service Contract Act of 1965, as Amended (JUL 05) - Applies to orders over $2,500.

FAR 52.222-42 Statement of equivalent Rates (MAY 89) - Applies if the order amount is expected to be over $2,500 and the Service Contract Act is applicable.

FAR 52.222-43 Fair Labor Standards Act and Service Contract Act-Price Adjustment (Multiple Year and Option Contracts)(MAY 89) - Applies to orders containing Service Contract Act and is a multiple year contract or is a contract with options to renew.

FAR 52.222-48 Exemption from Application of Service Contract Act Provisions for Contracts for Maintenance, Calibration, and/or Repair of Certain Information Technology, Scientific and Medical and/or Office and Business Equipment - Contractor Certification(AUG 96) - Applies in any order calling for maintenance, calibration, and/or repair of information technology, scientific and medical that is exempt from

Continued ...

ORDER FOR SUPPLIES OR SERVICES
SCHEDULE - CONTINUATION

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IMPORTANT: Mark all packages and papers with contract and/or order numbers.

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ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY ORDERED (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)	QUANTITY ACCEPTED (G)

Service Contract Act.

Contractor complete - The offeror certifies ___ does not certify ___.

FAR 52.222-50 Combating Trafficking in Persons(APR 06) - applies to all acquisitions for services except those acquired under FAR Part 12 Commervial Services).

FAR 52.223-12 Refrigeration Equipment and Air Conditioners (MAY 95) - Applies when the order includes the maintenance, repair or disposal of any equipment or appliance using ozone-depleting substances as a refrigerant, such as air conditioners, including motor vehicles, refrigerators, chillers, or freezers.

FAR 52.224-1 Privacy Act Notification (APR 84) - Required when the design, development , or operation of a system of records on individuals is required to accomplish an agency function.

FAR 52.224-2 Privacy Act (APR 84) - Required when Privacy Act Notification, FAR 52.224-1, is used.

FAR 52.227-14 Rights in Data--General (JUN 87) - Applies to orders if it is contemplated that data will be produced, furnished, or acquired under the order.

FAR 52.237-1 Site Visit (APR 84) - Applies when services are to be performed on Government installations, unless the solicitation is for construction.

FAR 52.237-2 Protection of Government Buildings (APR 84) - Applies when services are to be performed on Government installations, unless a construction contract is contemplated.

FAR 52.239-1 Privacy or Security Safeguards (AUG 96) - Applies in orders for information technology which require security of information technology, and/or are for the design, development, or operation of a system of records using commercial information technology services or support services.

FAR 52.243-1 Changes-Fixed Price(AUG 87), Alternative 1 (APR 84)

Attachment E

For use in covered GSA schedule, GWAC, JWAC or MAC orders or BPA's or BPA calls where the underlying contract or BPA does not include the language and the order or call is placed after the effective date of the DOJ requirement as noted for each item.

DOJ Specific Clause - DOJ Prohibition on use of Non-US Citizens in orders where contractor personnel are accessing or assisting in the development, operation,

Continued ...

ORDER FOR SUPPLIES OR SERVICES
SCHEDULE - CONTINUATION

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IMPORTANT: Mark all packages and papers with contract and/or order numbers.

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management or maintenance of DOJ IT Systems (Applicable to all affected orders after July 12, 2001):

"The Department of Justice does not permit the use of Non-U.S. citizens in the performance of this contract or commitment for any position that involves access to or development of any DOJ IT system. By signing the contract or commitment document, or commencing work thereunder, the contractor agrees to this restriction. [In those instances where other non-IT requirements contained in the contract or commitment can be met by using Non-U.S. citizens, those requirements shall be clearly described]"

END OF CLAUSE

DOJ Specific Provision - DOJ Residency Requirement - Applicable to all orders for services where contractor personnel are assigned to the order and working in the United States issued after December 10, 2002):

All contractor employees assigned to this contract and working within the United States shall meet the DOJ Residency Requirement. The Residency Requirement states that, for three of the five years immediately prior to applying for a position, the individual must have: 1) resided in the United States; 2) worked for the United States overseas in a Federal or military capacity; or 3) be a dependent of a Federal or military employee serving overseas.

This requirement can be waived for short-term (i.e., those employees performing duties for a cumulative total of 14 days or less) if there is a critical need for their specialized or unique skills (for example, interpreters for rare foreign languages). These individuals, however, must be United States citizens or Permanent Resident Aliens. The contractor shall have received waiver approval prior to utilization of any employee on this contract/order who does not meet this clause requirement.

http://www.opm.gov/employ/html/Citizen.htm
Additionally, a contractor employee who is not a U.S. citizen (and otherwise is proposed for approval under the waiver process described above) must be from a country allied with the United States. Since the countries on the Allied Countries List are subject to change, the contractor may review the above listed website for current information.

Total amount of award: $144,500.00. The obligation for this award is shown in box 17(i).

TOTAL CARRIED FORWARD TO 1ST PAGE (ITEM 17(H))

Attachment A – Technical Requirements for Bidders

I. Qualifications

A. To qualify as a bidder under this contract:

1. The Contractor must:

a. Be licensed to conduct business in the states in which the assigned bankruptcy cases are filed, when required; and

b. Include at least one employee on the team for conducting debtor audits who is a member in good standing of the American Institute of Certified Public Accountants, a state accounting society, or another recognized professional accounting organization, and who is not the subject of any pending state disciplinary action.

2. The Contractor and all of its employees must:

a. Agree not to disclose the contract provisions, particularly the audit procedures and the descriptions of material misstatements, to any third parties, including the bankruptcy trustees, debtors, debtors' attorneys, creditors, and other members of the public, regardless of whether the bidder is awarded the contract;

b. Not be related by affinity or consanguinity within the degree of first cousin to any employee of the EOUST or to any employee of the USTP for the judicial district in which he or she is applying, unless such employee is involved only in performing administrative tasks that do not involve the evaluation, rating, selection, or approval of an award of a contract; and

c. Not be a chapter 7 or chapter 13 trustee.

B. Bankruptcy experience is preferable, but not required.

C. Experience in conducting investigations, auditing, or forensic and fraud examinations is desirable.

D. The technical proposal should describe the Contractor's relevant background and experience, including related past projects and references, and the methods and procedures to be used to perform and manage the contract.

E. The technical proposal should also identify the personnel resources to be used to perform services under the contract, including the following information:

1. Name;
2. Education: academic and professional;
3. Other related training/education;
4. Professional affiliations and state licenses;
5. Current responsibilities;
6. Length of relationship with the firm;
7. Number of years of professional experience in the general related area;
8. Professional experience, including those experiences that relate to the requirements of the solicitation; and
9. What the person will be assigned to do.

F. If the Contractor and/or the individuals performing the debtor audits are bound by a professional code of ethics either through membership in a professional association or through licensure by a state agency, the technical proposal should provide a description of the code of ethics, and if possible, a copy.

G. If the Contractor participates in a peer review program, or an equivalent quality control review program, the technical proposal should include a copy of the firm's latest peer review report.

II. Conflicts of Interest After Contract Award

A. The Contractor, including the firm, its employees, and the individuals performing the debtor audits, must review each assigned case for conflicts of interest and refuse the assignment if the Contractor is not independent with respect to the debtor, debtor's attorney, creditors, or case trustee.

B. The Contractor may be asked to accept cases in which other Contractors have conflicts. These cases may have been filed in jurisdictions in which the Contractor otherwise does not serve.

C. It is expected that a conflict of interest will be rare. This is essential to assure a smooth and efficient audit assignment process. If a Contractor anticipates otherwise, it should disclose this possibility in the bid package and consider not bidding.

D. Further information and examples of conflicts of interest can be found in the Statement of Work at Attachment D under "General Terms and Conditions."

III. Other Audit-Related Requirements and Working Papers

A. Upon contract award, the Contractor should provide the name of the primary point of contact concerning day-to-day debtor audit matters. The OUST also will designate a point of contact.

B. The individuals performing the debtor audits will need to be alert for indications of potential irregularities. Upon the discovery of suspected criminal activity or the possible dissipation of assets, the Contractor should immediately notify the OUST.

C. Because of the inherent nature of the bankruptcy laws and case administration, the audit process (i.e., case selection, notification to the debtor and other parties, performance of the audit, and issuance of the audit report) is subject to stringent timing constraints, as more fully described in the Statement of Work at Attachment D. The Contractor should complete each debtor audit as soon as possible. The Contractor's report on the debtor audit must be issued no later than **nine weeks (63 calendar days)** after the date of the Debtor Audit Notification Letter sent by the OUST (a sample of this letter can be found at Exhibit 2 to Attachment D).

D. The debtor audit "working papers" must adequately document the procedures performed and the results obtained.

1. The Contractor acknowledges and agrees that as part of its scope of work, the information and data, including any working papers and information, used in the debtor audits shall constitute the maintenance and operation of a portion of the system of records for debtor audits. The EOUST and the OUST shall have access to all such records, including the working papers, upon request. The EOUST periodically reviews working papers as part of its ongoing review and quality control efforts.

2. It is further acknowledged and agreed that the Contractor shall maintain such records for not less than six years from completion of the audit in cases in which the Contractor found one or more material misstatements and not less than three years from completion of the audit in cases in which the Contractor found no material misstatements. It is further acknowledged and agreed that the Contractor's obligation for safekeeping, maintenance, and access to said records shall survive the termination or expiration of the contract.

E. The Contractor may be requested to testify in court as to information contained in the working papers or to produce them as evidence. Further, the Contractor acknowledges that the working papers may be discoverable. See the next section, Audit Costs and Other Contract Matters, for further information on court appearances.

F. The Contractor acknowledges that the debtor audits and working papers may be subject to the Freedom of Information Act (5 U.S.C. § 552) and will cooperate fully with the EOUST in the event of any request made for such information in the Contractor's possession.

G. The Contractor and the individuals performing the debtor audits must safeguard the working papers and protect from disclosure all private information obtained about and from debtors. Specifically, the Contractor must protect and prevent disclosure of the debtors' and non-debtors' social security numbers; bank, credit card and other financial account information; medical information; names of minor children and other information specifically protected by the court except that such information may be disclosed to the OUST and case trustee. The Contractor may be asked to certify to the controls instituted to protect the debtor's privacy.

In connection with the preceding paragraph, the Contractor understands and agrees that it shall not undertake any act or forbearance which will result in a violation of the Privacy Act (5 U.S.C. § 552a). In fulfilling this obligation, the Contractor will safeguard and protect the information obtained during the debtor audits including any information concerning the debtor and non-debtors whose personal and financial information may be disclosed to the Contractor during the audit. Under no circumstances will the Contractor copy, use, sell, assign, share, or release any information concerning the financial and personal information obtained during such audit with any person or entity other than authorized employees of the EOUST, the OUST, and the case Trustee.

H. The OUST may ask the Contractor to provide the records submitted by the debtor.

I. At the conclusion of each debtor audit, the Contractor will file a report with the court and transmit a copy to the OUST and case trustee listing the "material misstatements" found during the audit. The format of the report and a list of the possible material misstatements are described in the Statement of Work. Depending upon the judicial district, the audit report may need to be provided in PDF, hard copy format, or both. Electronic data exchange also may be required. The audit report shall be filed with the court and transmitted to the OUST no later than **nine weeks (63 calendar days)** after the date of the Debtor Audit Notification Letter.

J. In addition, the Contractor will provide to the OUST: (1) copies of documentation that supports the material misstatements described in the Report of Audit (if any) and (2) a Statement of Other Items of Interest (as defined in the Statement of Work).

K. In rare circumstances, the Contractor may determine that the audit cannot be completed. In this event, the Contractor shall file with the court and transmit to the OUST a Report of No Audit, which is explained further in the Statement of Work. Some possible reasons for being unable to complete the audit are: (1) the debtor failed to respond to the Debtor Audit Notification Letter; (2) the debtor failed to provide a sufficient response to the Debtor Audit Notification Letter; or (3) the case was dismissed before a sufficient response was received.

IV. Audit Costs and Other Contract Matters

A. This solicitation will result in a Firm Fixed Price award. The bidder should provide one (per audit) quote for random audits and another (per audit) quote for targeted audits. The bid should include a nominal (per audit) amount for the "no audits."

B. The Contractor is responsible for establishing a PACER account. PACER is the bankruptcy court's electronic docketing and document retrieval system. Bankruptcy courts throughout the United States have converted to an electronic case management and case filing system known as CM/ECF. The PACER account will be used to review the docket for each assigned case and to download the bankruptcy schedules and statements for electronically filed cases. The Judicial Conference of the United States has established a fee to be collected for access to PACER. Registered users are currently charged $.08 per page for web access, up to a maximum of $2.40 per document. Further information on registering for PACER and the related costs can be found at the PACER web site: http://pacer.psc.uscourts.gov. The Contractor may not separately bill for PACER access charges.

C. The Contractor will be responsible for filing the debtor audit reports with the bankruptcy court. The reports will be filed electronically with the court. The Contractor will need to obtain a password for the court's electronic case filing system from the clerk of court in the districts in which it will be filing reports.

D. The Contractor will conduct, at its own expense, several commercial database and internet-based searches for each audit. The Contractor will need to arrange its own contracts with at least two commercial database search firms, such as ChoicePoint or Lexis-Nexis, and pay all fees associated with the searches. An example of the type of search that must be performed is ChoicePoint's Discovery PLUS! search. Additional searches are described in the Statement of Work and include real estate and auto valuation web sites. The Contractor should investigate and use other free and fee-based local and national databases and other computer resources within their firm, as appropriate, to accomplish the debtor audit procedures.

E. All other out-of-pocket costs for copying, delivery, secretarial time, and related disbursements shall be borne by the Contractor.

F. Attachment C lists the location covered by this solicitation and the anticipated number of random and targeted audits. The EOUST reserves the right to award these audits to multiple firms.

G. The Contractor shall provide an invoice on a monthly basis for all audit reports submitted during the preceding month. The invoice must include an invoice number, invoice date, description of the audits performed (e.g., random or targeted, case name, case number), "remit to" address, and tax identification number (TIN). Upon approval invoices will be processed for payment by the Executive Office for United States Trustees, Administrative Services Division, 20 Massachusetts Ave., N.W., Suite 8217, Washington, DC, 20530.

H. All payments under this contract will be made by Electronic Funds Transfer (EFT), in accordance with the Prompt Pay Act. To effect EFT, the Contractor must provide, upon contract award, the bank name, bank address, bank telephone number, bank routing number, account number, and account type.

Attachment B – Background Information on Bankruptcy

The Bankruptcy Code consists of nine chapters (as amended):

Chapter 1:	General Provisions;
Chapter 3:	Case Administration;
Chapter 5:	Creditors, the Debtor and the Estate;
Chapter 7:	Liquidation;
Chapter 9:	Adjustment of Debts of a Municipality;
Chapter 11:	Reorganization;
Chapter 12:	Adjustment of Debts of a Family Farmer with Regular Annual Income;
Chapter 13:	Adjustment of Debts of an Individual with Regular Income; and,
Chapter 15:	Ancillary and Other Cross-Border Cases.

As noted elsewhere, this Contract covers audits of cases filed by individuals under chapters 7 and 13. The Contractor is not expected to become an expert in bankruptcy law, but will, no doubt, find it useful to be familiar with the various bankruptcy provisions.

The Bankruptcy Code provisions of chapters 1, 3, and 5 apply to all cases under chapters 7, 11, and 13 and, with the exception of § 361, apply to cases under chapter 12. The provisions of chapter 7, chapter 9, chapter 11, chapter 12, and chapter 13 generally apply only to cases under that specific chapter. The Contractor is most concerned with the provisions of chapters 1, 3, 5, 7 and 13. The body of bankruptcy law also includes the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules), local bankruptcy rules, and relevant case law. Finally, chapter 39 of title 28 of the United States Code sets forth the duties and responsibilities of the United States Trustees.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 added new provisions to the United States Code prescribing audits of individuals who file for relief under chapters 7 and 13 of the Bankruptcy Code. The relevant provisions are:

1. the auditor has full access to all information contained in any paper filed or submitted in a bankruptcy case, but must not disclose information specifically protected by the court. 11 U.S.C. § 107(c)(3).

2. the auditor may have access to the names of the debtor's minor children in a non-public record made available by the court for examination by the auditor, but must not disclose the names of such minor children maintained in such nonpublic record. 11 U.S.C. § 112.

3. the clerk of the court is responsible for providing individual debtors with a written notice containing statements that: (a) a person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury in connection with a bankruptcy case shall be subject to fine, imprisonment, or both; and (b) all information supplied by a debtor in connection with a bankruptcy case is subject to examination by the Attorney General. 11 U.S.C. § 342(b)(2).

4. the debtor has a duty to cooperate with the auditor. 11 U.S.C. § 521(a)(3).

5. the debtor has a duty to provide records to the auditor. 11 U.S.C. § 521(a)(4).

6. a Debt Relief Agency must provide written notice that information provided by the debtor during the case may be audited and that failure to provide such information may result in dismissal of the bankruptcy case or other sanction, including criminal sanctions. 11 U.S.C. § 527(a)(2)(D).

7. the debtor's discharge may be revoked if the debtor fails to adequately explain a material misstatement in an audit or fails to make available all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit. 11 U.S.C. § 727(d)(4).

8. the United States Trustee is authorized to contract with auditors to perform the debtor audits. 28 U.S.C. § 586(f)(1).

9. the requirements for: (a) the audit report to be filed with the court and transmitted to the United States Trustee; (b) the report to clearly and conspicuously specify any material misstatements; (c) the clerk to notify creditors when a material misstatement has been reported; and (d) the United States Trustee to take appropriate action when a material misstatement has been reported. 28 U.S.C. § 586(f)(2).

In a chapter 7 case, also known as a "liquidation" case, the debtor gives up any non-exempt property or value in property that is not protected by an exemption at the time of filing the bankruptcy petition, in order to be released from any further personal liability for certain pre-bankruptcy debts. This type of bankruptcy relief is available to individuals, partnerships and corporations. When the debtor files for bankruptcy under chapter 7, the case is considered voluntary; when the creditors file, the case is considered involuntary. Chapter 7 cases also result from the conversion of a case from another bankruptcy chapter to chapter 7. Only individual chapter 7 cases may be chosen for a debtor audit.

Chapter 13, often called wage-earner bankruptcy, is used primarily by individual consumers to restructure their debt without liquidating their assets. The chapter 13 debtor makes regular payments over a three to five year period to the standing trustee pursuant to a court-approved repayment plan. To be eligible for chapter 13 relief, a consumer must have regular income and may not have more than a certain amount of debt, as set forth in the Bankruptcy Code. Any chapter 13 case can potentially be chosen for a debtor audit.

Except when an involuntary case is filed by creditors of a debtor, debtors initially file a petition to commence a case. Typically, debtors are represented by counsel. The debtors not represented by counsel are referred to as *pro se* (or *pro per*) debtors.

Debtors must file schedules and a statement of financial affairs within 15 days of the filing of the petition, but in most cases, they file the schedules and statement of financial affairs with the petition. In addition, in chapter 7 cases, debtors with primarily consumer debts must file the Form B22A, the Statement of Current Monthly Income and Means Test Calculation. All chapter 13 debtors must file Form B22C, the Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income. If the schedules and statements are not filed, many courts will automatically dismiss the case unless an additional extension is requested by the debtor and approved by the court. If the court does not automatically dismiss the case, the United States Trustee may file a motion to dismiss the case because of the unfiled schedules and statements.

The schedules and statements are prepared in accordance with the Bankruptcy Code and the criteria contained in the Official Bankruptcy Forms, which can be viewed or downloaded at http://www.uscourts.gov/bkforms/index.html. There are no standards such as generally accepted accounting principles. Assets are to be reported in the schedules at their "current market values."
Debtors declare under penalty of perjury that they have read the summary and schedules and that they are true and correct to the best of their knowledge, information and belief. Debtors separately declare under penalty of perjury that they have read the answers contained in the statement of financial affairs and any attachments thereto and that they are true and correct.

The United States Trustee is charged, pursuant to 28 U.S.C. § 586, with the responsibility for establishing, maintaining, and supervising panels of chapter 7 trustees, appointing and supervising chapter 13 standing trustees, and supervising cases under chapters 7 and 13 of the Bankruptcy Code. The United States Trustees are executive-level government employees appointed by the United States Attorney General to supervise trustees and their administration of cases in 21 regions. The regions are further broken down into 95 local offices, each headed by an Assistant United States Trustee.

The bankruptcy trustee, a private individual who is not a government employee, is a fiduciary charged with protecting the interests of the bankruptcy estate. In chapter 7 cases, the trustee is responsible for the recovery, preservation, liquidation, and distribution of chapter 7 estate assets, and for carrying out the other duties as specified in 11 U.S.C. § 704. In chapter 13 cases, the trustee receives and distributes funds in accordance with approved plans and carries out other duties specified in 11 U.S.C. § 1302.

Bankruptcy judges are Article I federal judges appointed to 14-year terms to decide cases and controversies in bankruptcy proceedings. The bankruptcy clerk of court is appointed by the bankruptcy judges in the judicial district, and is an employee of the judicial branch of government. The clerk of court and staff accept filings in bankruptcy cases and maintain official bankruptcy court files, in addition to performing other duties required by the Bankruptcy Code, related laws, and the Bankruptcy Rules.

[BID GROUP #1]

Attachment C – Locations and Estimated Number of Debtor Audits Covered by This Solicitation

JUDICIAL DISTRICT	ESTIMATED NUMBER OF RANDOM AUDITS	ESTIMATED NUMBER OF TARGETED AUDITS	UNITED STATES TRUSTEE OFFICE LOCATION(S)
Connecticut	44	8	New Haven
Massachusetts	71	13	Boston, Worcester
Maine	18	3	Portland
New Hampshire	18	3	Manchester
New York, Eastern	103	19	Brooklyn, Central Islip
New York, Northern	68	13	Albany, Utica
New York, Southern	69	13	Albany, Manhattan
New York, Western	59	11	Buffalo, Rochester
Rhode Island	16	3	Providence
Vermont	7	1	Albany (NY)
Total	473	87	

Audit Services Pricing Schedule

Type of Audit	Bid Price (per audit)
Random Audit	**$** _____
Targeted Audit	**$** _____
"No Audit"	**$** _____

[BID GROUP #2]

Attachment C – Locations and Estimated Number of Debtor Audits Covered by This Solicitation

JUDICIAL DISTRICT	ESTIMATED NUMBER OF RANDOM AUDITS	ESTIMATED NUMBER OF TARGETED AUDITS	UNITED STATES TRUSTEE OFFICE LOCATION(S)
District of Columbia	8	1	Alexandria (VA)
Delaware	14	3	Wilmington
Maryland	114	21	Baltimore, Greenbelt
New Jersey	159	29	Newark
Pennsylvania, Eastern	93	17	Philadelphia
Pennsylvania, Middle	55	10	Harrisburg
Pennsylvania, Western	80	15	Pittsburgh
South Carolina	60	11	Columbia
Virginia, Eastern	110	20	Alexandria, Norfolk, Richmond
Virginia, Western	46	9	Roanoke
West Virginia, Northern	18	3	Charleston
West Virginia, Southern	27	5	Charleston
Total	784	144	

Audit Services Pricing Schedule

Type of Audit	Bid Price (per audit)
Random Audit	$ _____
Targeted Audit	$ _____
"No Audit"	$ _____

[BID GROUP #3]

Attachment C – Locations and Estimated Number of Debtor Audits Covered by This Solicitation

JUDICIAL DISTRICT	ESTIMATED NUMBER OF RANDOM AUDITS	ESTIMATED NUMBER OF TARGETED AUDITS	UNITED STATES TRUSTEE OFFICE LOCATION(S)
Louisiana, Eastern	38	7	New Orleans
Louisiana, Middle	17	3	New Orleans
Louisiana, Western	60	11	Shreveport
Mississippi, Northern	33	6	Jackson
Mississippi, Southern	50	9	Jackson
Texas, Eastern	50	9	Tyler
Texas, Northern	123	23	Dallas
Texas, Southern	104	19	Corpus Christi, Houston
Texas, Western	80	15	Austin, San Antonio
Total	555	102	

Audit Services Pricing Schedule

Type of Audit	Bid Price (per audit)
Random Audit	**$** _____
Targeted Audit	**$** _____
"No Audit"	**$** _____

[BID GROUP #4]

Attachment C – Locations and Estimated Number of Debtor Audits Covered by This Solicitation

JUDICIAL DISTRICT	ESTIMATED NUMBER OF RANDOM AUDITS	ESTIMATED NUMBER OF TARGETED AUDITS	UNITED STATES TRUSTEE OFFICE LOCATION(S)
Michigan, Eastern	182	34	Detroit
Michigan, Western	67	12	Grand Rapids
Ohio, Northern	183	34	Cleveland
Ohio, Southern	164	30	Cincinnati, Columbus
Total	596	110	

Audit Services Pricing Schedule

Type of Audit	Bid Price (per audit)
Random Audit	**$** _____
Targeted Audit	**$** _____
"No Audit"	**$** _____

[BID GROUP #5]

Attachment C – Locations and Estimated Number of Debtor Audits Covered by This Solicitation

JUDICIAL DISTRICT	ESTIMATED NUMBER OF RANDOM AUDITS	ESTIMATED NUMBER OF TARGETED AUDITS	UNITED STATES TRUSTEE OFFICE LOCATION(S)
Arkansas, Eastern	61	11	Little Rock
Arkansas, Western	34	6	Little Rock
Iowa, Northern	19	4	Cedar Rapids
Iowa, Southern	31	6	Des Moines
Kentucky, Eastern	50	9	Lexington
Kentucky, Western	59	11	Louisville
Minnesota	65	12	Minneapolis
Missouri, Eastern	76	14	St. Louis
Missouri, Western	70	13	Kansas City
North Dakota	9	2	Sioux Falls (SD)
Nebraska	35	6	Omaha
South Dakota	11	2	Sioux Falls
Tennessee, Eastern	76	14	Chattanooga
Tennessee, Middle	61	11	Nashville
Tennessee, Western	101	19	Memphis
Total	758	140	

Audit Services Pricing Schedule

Type of Audit	Bid Price (per audit)
Random Audit	**$** _____
Targeted Audit	**$** _____
"No Audit"	**$** _____

[BID GROUP #6]

Attachment C – Locations and Estimated Number of Debtor Audits Covered by This Solicitation

JUDICIAL DISTRICT	ESTIMATED NUMBER OF RANDOM AUDITS	ESTIMATED NUMBER OF TARGETED AUDITS	UNITED STATES TRUSTEE OFFICE LOCATION(S)
Illinois, Central	61	11	Peoria
Illinois, Northern	212	39	Chicago, Madison (WI)
Illinois, Southern	38	7	Peoria
Indiana, Northern	81	15	South Bend
Indiana, Southern	131	24	Indianapolis
Wisconsin, Eastern	71	13	Milwaukee
Wisconsin, Western	34	6	Madison
Total	628	115	

Audit Services Pricing Schedule

Type of Audit	Bid Price (per audit)
Random Audit	$ _____
Targeted Audit	$ _____
"No Audit"	$ _____

[BID GROUP #7]

Attachment C – Locations and Estimated Number of Debtor Audits Covered by This Solicitation

JUDICIAL DISTRICT	ESTIMATED NUMBER OF RANDOM AUDITS	ESTIMATED NUMBER OF TARGETED AUDITS	UNITED STATES TRUSTEE OFFICE LOCATION(S)
Arizona	121	22	Phoenix
California, Central	231	43	Los Angeles, Riverside, Santa Ana, Woodland Hills
California, Eastern	110	20	Fresno, Sacramento
California, Northern	82	15	Oakland, San Francisco, San Jose
California, Southern	44	8	San Diego
Guam	2	1	Honolulu (HI)
Hawaii	12	2	Honolulu
Northern Mariana Islands	1	1	Honolulu (HI)
Nevada	66	12	Las Vegas, Reno
Total	669	124	

Audit Services Pricing Schedule

Type of Audit	Bid Price (per audit)
Random Audit	**$** _____
Targeted Audit	**$** _____
"No Audit"	**$** _____

[BID GROUP #8]

Attachment C – Locations and Estimated Number of Debtor Audits Covered by This Solicitation

JUDICIAL DISTRICT	ESTIMATED NUMBER OF RANDOM AUDITS	ESTIMATED NUMBER OF TARGETED AUDITS	UNITED STATES TRUSTEE OFFICE LOCATION(S)
Alaska	6	1	Anchorage
Colorado	108	20	Denver
Idaho	37	7	Boise
Kansas	63	12	Wichita
Montana	17	3	Great Falls
New Mexico	35	6	Albuquerque
Oklahoma, Eastern	19	4	Tulsa
Oklahoma, Northern	29	5	Tulsa
Oklahoma, Western	54	10	Oklahoma City
Oregon	93	17	Boise (ID), Eugene, Portland
Utah	80	15	Salt Lake City
Washington, Eastern	36	7	Spokane
Washington, Western	112	21	Seattle
Wyoming	10	2	Cheyenne
Total	699	130	

Audit Services Pricing Schedule

Type of Audit	Bid Price (per audit)
Random Audit	$ _____
Targeted Audit	$ _____
"No Audit"	$ _____

[BID GROUP #9]

Attachment C – Locations and Estimated Number of Debtor Audits Covered by This Solicitation

JUDICIAL DISTRICT	ESTIMATED NUMBER OF RANDOM AUDITS	ESTIMATED NUMBER OF TARGETED AUDITS	UNITED STATES TRUSTEE OFFICE LOCATION(S)
Florida, Middle	202	37	Orlando, Tampa
Florida, Northern	26	5	Tallahassee
Florida, Southern	104	19	Miami
Georgia, Middle	69	13	Macon
Georgia, Northern	170	31	Atlanta
Georgia, Southern	59	11	Savannah
Puerto Rico	51	9	San Juan
U.S. Virgin Islands	1	1	Atlanta (GA)
Total	682	126	

Audit Services Pricing Schedule

Type of Audit	Bid Price (per audit)
Random Audit	$ _____
Targeted Audit	$ _____
"No Audit"	$ _____

[BID GROUP #10]

Attachment C – Locations and Estimated Number of Debtor Audits Covered by This Solicitation

JUDICIAL DISTRICT	ESTIMATED NUMBER OF RANDOM AUDITS	ESTIMATED NUMBER OF TARGETED AUDITS	UNITED STATES TRUSTEE OFFICE LOCATION(S)
North Carolina Eastern	130	26	Raleigh
North Carolina Middle	60	12	Greensboro
North Carolina Western	50	10	Charlotte
Alabama Northern	110	20	Birmingham
Alabama Middle	40	8	Montgomery
Alabama Southern	30	6	Mobile
Total	420	82	

Audit Services Pricing Schedule

Type of Audit	Bid Price (per audit)
Random Audit	$ _____
Targeted Audit	$ _____
"No Audit"	$ _____

Attachment D – Statement of Work for Audits[1] of Chapter 7 and Chapter 13 Debtors

This Statement of Work sets forth the requirements for audits of the bankruptcy petitions, schedules, and statements filed by chapter 7 and chapter 13 debtors pursuant to 11 U.S.C. §§ 521 and 1322. The purpose of the "debtor audit" is to determine the accuracy, veracity, and completeness of the information provided in these documents.

The United States Trustee Program (USTP or Program), a component of the Department of Justice, is responsible for overseeing the administration of bankruptcy cases and private trustees under 28 U.S.C. § 586 and 11 U.S.C. § 101, et seq. The Program consists of 21 regions with 95 field offices nationwide. The field office, or local Office of United States Trustee (OUST), associated with this Contract is identified in Attachment C to the Request for Quotation. Additional information about the Program and this particular OUST may be found at: www.usdoj.gov/ust, www.usdoj.gov/ust/maps.htm, and www.usdoj.gov/ust/regional_links.htm.

The Executive Office for United States Trustees (EOUST), located in Washington, D.C., is responsible for the overall administration of the Contract covering this Statement of Work. EOUST points of contact are: Mark A. Redmiles, Chief, Civil Enforcement Unit, and Michael Leamon, Deputy Assistant Director, Administrative Services Division. Contractors will work on a day-to-day basis with the OUST, which is headed by an Assistant United States Trustee. The OUST will designate a local point of contact for the Contractor.

The provisions described in the Request for Quotation Information Sheet and in Attachment A thereto, entitled Technical Requirements for Bidders, are incorporated herein by reference.

I. BACKGROUND

Chapter 7 and chapter 13 debtors and, when represented, their counsel[2] prepare bankruptcy petitions, schedules and statements in accordance with the Bankruptcy Code and the criteria contained in the Official Bankruptcy Forms, which are available at http://www.uscourts.gov/bkforms/index.html.

The appropriate location for filing for bankruptcy is governed by 28 U.S.C. § 1408. In general, a debtor will file in the judicial district that is the location of the debtor's (1) domicile, (2) residence, (3) principal place of business, or (4) principal assets in the United States. There is a bankruptcy court located in each judicial district. See Attachment B to the Request for Quotation for additional information about bankruptcy.

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[1] The terms "debtor audit" and "audit," as used in this Statement of Work, do not refer to audits conducted in accordance with generally accepted auditing standards. Debtor audits involve the review of information listed by chapter 7 debtors in their bankruptcy petitions, schedules and statements, and additional information provided by debtors specifically for the debtor audits.

[2] Debtors who file for relief under the Bankruptcy Code without counsel are referred to as *pro se* (or *pro per*) debtors.

Bankruptcy courts throughout the United States have converted to an electronic case management and case filing system known as CM/ECF.[3] PACER is the bankruptcy court's electronic docketing and document retrieval system. The Contractor will use PACER to review the docket for each assigned case and to download the bankruptcy schedules and statements for electronically filed cases. Information on registering for PACER and the related costs can be found at the PACER web site: http://pacer.psc.uscourts.gov.

The debtor audit is conducted in the Contractor's office. The Contractor will determine whether the originally filed Schedules, Bankruptcy Form B22A or B22C, and Statement of Financial Affairs (SOFA) contain material misstatements by comparing and testing selected items on the debtor's originally filed Schedules, SOFA, and Bankruptcy Forms B22A or B22C with additional documents requested from the debtor specifically for the audit, as well as with searches for unreported assets and verification of market values using commercially and publicly available databases. The Contractor will review information downloaded from the bankruptcy court's records, as well as information sent directly to the Contractor by the debtor or debtor's counsel. The Contractor will not conduct an on-site examination of the debtor's home or business premises, nor will the Contractor have a face-to-face meeting with the debtor. Special procedures, described in the next section, govern communications with debtors and debtor's counsel.

II. GENERAL TERMS AND CONDITIONS

A. Quick-Turnaround – Because of the inherent nature of the bankruptcy process, the audits (i.e., case selection, notification to the debtor and other parties, performance of the audit, and issuance of the audit report) are subject to stringent timing constraints, as more fully described herein. The Contractor should complete each debtor audit as soon as possible. The Contractor's report on the debtor audit shall be filed with the court and transmitted to the OUST no later than **nine weeks (63 calendar days)** after the date of the Debtor Audit Notification Letter sent by the OUST. See Exhibits 2(a) and 2(b) for samples of the Debtor Audit Notification Letter.

B. Audit Assignment – The EOUST contact person will notify the Contractor by e-mail of each potential case assignment. Upon receipt of the e-mail, the Contractor needs to immediately review the case for conflicts (see below) and, within two business days, notify the EOUST contact person if there are any conflicts. If the EOUST contact person has not heard from the Contractor within this period, the Debtor Audit Notification Letter will be sent to the debtor's attorney or the debtor, if not represented by counsel, the Contractor, and the case trustee. Accompanying the letter is a request for additional documents to be provided to the Contractor within three weeks. The Debtor Audit Notification Letter is the Contractor's formal notice that a debtor audit has been assigned under the contract.

[3]Some bankruptcy courts utilize the Case Management (CM) portion of this program and not the Electronic Case Filing (ECF) program. A few bankruptcy courts utilize a different electronic case management and filing system.

C. Check for Conflicts of Interest – Upon selection of a case for audit and prior to sending the Debtor Audit Notification Letter, the EOUST contact person will e-mail the case number; debtor's name, address, and social security number; trustee name; and bankruptcy court web address to the Contractor with a request to check for conflicts of interest. The Contractor will need to review the bankruptcy filing using PACER to determine if a conflict exists. Specifically, the Contractor needs to consider the name of the case trustee, the names of the debtor(s) and attorneys on the petition, and the list of creditors (Schedules D, E, and F). In a few jurisdictions, the bankruptcy filing may not be available through PACER. If not, the Contractor will be advised of alternate arrangements. The Contractor must notify the EOUST contact person if a conflict exists within two business days. If the Contractor does not respond within this time period, it will be assumed that no conflict exists. A Contractor, its employees, and the individuals performing the debtor audits will be considered to have a conflict and be ineligible to conduct an audit of a bankruptcy case where one or more of the following facts exist:

1. One or more of the Contractor's employees are related to the chapter 7 or standing trustee, the debtor, or the debtor's spouse;

2. The Contractor or its employees have performed services for the debtor, the debtor's spouse, or the debtor's business in the last two years;

3. The Contractor or its employees are creditors of, have claims against, or are otherwise owed money by the debtor;

4. The Contractor or its employees served as trustee, examiner, or a professional in any case filed by the debtor in the last two years; or

5. The Contractor or its employees performed services for a creditor, the debtor's attorney, or the case trustee in the last two years, unless the individuals performing the debtor audits are subject to an appropriate information barrier from the part of the Contractor's firm that performed the services for a creditor, the debtor's attorney, or the case trustee.

D. Communications with the Debtor – As noted above, it is anticipated that the Contractor will not meet face-to-face with debtor's counsel or the debtor. If a face-to-face meeting is requested by the debtor or debtor's counsel, the Contractor must refer the request to the OUST. All telephone, e-mail, or written information requests and queries must go through the debtor's counsel for audits of represented debtors, unless counsel authorizes the Contractor to communicate directly with the debtor via Debtor Form B– Instructions to Contractor Regarding Communications with Debtor(s). The OUST sends Debtor Form B to the debtor's counsel with the Debtor Audit Notification Letter (see Exhibit 2 to Attachment D). The Contractor can determine if a debtor is represented by noting the party to whom the Debtor Audit Notification Letter was sent. The OUST will send the Debtor Audit Notification Letter to the debtor only when the debtor is not represented by counsel (i.e., a *pro se* debtor).

E. Appropriate Communications with Debtors and Debtors' Counsel – The Contractor should not orally discuss the specific findings of the Audit Report with debtor's counsel or the debtor. The following are examples of appropriate contacts between the Contractor and the debtor or debtor's counsel that do not require prior consultation with the OUST:

1. The Contractor contacts debtor's counsel or the *pro se* debtor to determine if the Debtor Audit Notification Letter has been received.

2. The debtor needs more time to respond to the Debtor Audit Notification Letter. If the debtor contacts the Contractor, the Contractor must first ascertain whether the debtor is represented by counsel. If so, and if the debtor's counsel has not authorized the Contractor to have direct contact with the debtor via Debtor Audit Form B, the Contractor may not discuss the matter and should advise the debtor to make the request through counsel. If the debtor filed *pro se*, the Contractor may discuss the matter with the debtor.

3. The Contractor sends a follow-up letter to the debtor's counsel or the debtor (if the debtor is *pro se* or counsel has authorized direct contact with the debtor) when the debtor has not responded to the Debtor Audit Notification Letter. A sample follow-up letter is included at Exhibit 3.

4. Two commercial database searches disclose that a person with the same name as the debtor owns real estate that was not listed on Schedule A. As specified in Statement of Work section V.J (under Debtor Audit Procedures), the Contractor contacts debtor's counsel, or the *pro se* debtor, to confirm whether the property is owned by the debtor. If the debtor states that he or she does not own the property, the Contractor obtains an affidavit or declaration under penalty of perjury to that effect. A sample affidavit is included at Attachment 6. This same procedure would apply where two commercial databases reveal that real estate appears to have been transferred by the debtor in the two years preceding the filing of the bankruptcy petition where no gift or transfer of the property is listed on SOFA Question 7 or 10.

5. The debtor's bank statements and check register contain unexplained transactions. As described in Statement of Work section V.H.2 (under Debtor Audit Procedures), the Contractor contacts debtor's counsel, or the *pro se* debtor, for an explanation.

6. Before including a material misstatement in a Debtor Audit, the Contractor should contact the debtor's counsel, or the *pro se* debtor, in writing, notifying the debtor of the concern and offering the debtor an opportunity to provide an immediate written explanation for the item(s) in question.

F. Potential Criminal Activity or Loss of Assets – Upon the discovery of suspected criminal activity or the possible dissipation of assets, the Contractor should immediately notify the OUST.

G. Inability to Complete the Debtor Audit – In some circumstances, the Contractor may determine that the audit cannot be completed. When this occurs, the Contractor shall file with the court and transmit to the OUST a Report of No Audit. A sample format for the Report of No Audit can be found at Exhibit 7. Some possible reasons for being unable to complete the audit are: (1) the debtor failed to respond to the Debtor Audit Notification Letter; (2) the debtor failed to provide a sufficient response to the Debtor Audit Notification Letter; or (3) the case was dismissed before a sufficient response was received. Additional information pertaining to "no audits" is contained in the remainder of this Statement of Work.

III. OBTAINING A SUFFICIENT RESPONSE TO THE DEBTOR AUDIT NOTIFICATION LETTER

A. Upon receipt of the Debtor Audit Notification Letter, the Contractor should confirm that it has a complete copy of the debtor's original bankruptcy petition, schedules, and statements, plus any amendments that were filed prior to the date of the Debtor Audit Notification Letter. If the debtor files amendments before being notified of the audit, the amended versions shall be used for the audit. If the debtor files amendments after the date of the Debtor Audit Notification Letter, the amendments are to be disregarded.

B. Within one week of receiving the Debtor Audit Notification Letter, the Contractor should call the debtor's counsel or the *pro se* debtor to verify that the letter was received. Reinforce the short three-week turnaround time for providing the requested items. If the letter was not received, mail, fax, or e-mail a copy.

1. If debtor's counsel (or *pro se* debtor) responds to this first letter by requesting more time, the Contractor may grant an extension not to exceed two weeks.

2. If there is no response to the first letter, the Contractor shall send a follow-up letter on the 22nd day, giving an additional week to respond. (See Exhibit 3 for follow-up letter format.)

3. If the response to the second letter is a request for more time, the Contractor may grant a two-week extension.

4. If there is no response to the second letter or the debtor's attorney or *pro se* debtor fails to sufficiently respond (see below) within six weeks (42 calendar days) of the Debtor Audit Notification Letter, all audit efforts cease and the Contractor shall file with the court and transmit to the OUST a Report of No Audit.

C. Sufficiency of the Debtor's Response: The Document Request attached to the Debtor Audit Notification Letter asks debtor's counsel or the *pro se* debtor to provide four categories of documents. A "sufficient response" is one in which the debtor has provided all of the requested documents, or one in which the debtor has provided some of the documents and a satisfactory explanation as to why the documents not provided do not exist. Part of the Contractor's responsibility is to evaluate the veracity and sufficiency of the debtor's response. The following guidance is provided to make this determination:

1. Federal income tax returns for the two most recent taxable periods prior to the date of the bankruptcy petition, with all attachments (e.g., all supporting schedules, depreciation schedules, W-2s, 1099s, and K-1s)

   a. The debtor is required to provide the case trustee with a copy of the federal income tax return for the most recent tax year prior to filing and for which a federal income tax return was filed (or a transcript of such return, at the election of the debtor). 11 U.S.C. § 521(e)(2)(A)(I).

   b. For the debtor audit, the debtor is required to provide copies of the federal income tax returns for the two most recent taxable periods prior to the date of the bankruptcy petition, with all attachments.

      (i) If the debtor claims not to have copies, the Contractor should ask the debtor to obtain copies from the Internal Revenue Service.

      (ii) If the debtor states that one or more of the returns have not been filed, then they must provide the two most recently filed federal income tax returns.

      (iii) If the response is that the debtor is not required to file federal income tax returns, the Contractor should consider the reasonableness of this assertion in light of the income reported in SOFA Questions 1 and 2 and in Schedule I.

2. Account statements for all depository and investment accounts for the six calendar months preceding the date of the filing of the bankruptcy petition plus the month in which the petition was filed, along with sufficient documentation to reasonably explain the source of deposits or credits, and the purpose of checks, withdrawals, or debits.

   a. The debtor is requested to provide this information for checking, savings, money market, mutual fund, and brokerage accounts. Examples of documentation for deposit and withdrawal transactions include transaction descriptions on the statements themselves, canceled or imaged checks, check registers, and

annotations on or attached to account statements, or any combination thereof.

b. If the debtor indicates that there are no such accounts and this representation is consistent with the schedules and statements and the debtor's payment advices and tax return, this response is considered adequate and complete.

c. If the debtor states that such accounts exist but some or all of the account statements were not retained, the debtor must obtain copies from the depository, broker, etc.

d. If canceled checks or images of canceled checks are not available, a check register may be a reasonable substitute. If neither are available, the debtor must obtain copies of the canceled checks from the depository.

3. Payment advices or other evidence of payment from an employer for the six calendar months immediately preceding the filing date of the bankruptcy petition from the debtors, or from an individual debtor and the individual debtor's non-filing spouse, unless the debtor has checked box 2.b on Form B22A.

If the response is that payment advices or other evidence of payment from an employer are not available because the debtor(s) is/are unemployed, the Contractor should consider the reasonableness of this assertion in light of the disclosures in the schedules and statements.

4. Divorce decree and any related property settlement and support orders and amendments thereto, if the debtor(s) is/are divorced

a. If the requested information is not provided, the Contractor should determine if this is reasonable based on the information entered by the debtor(s) on Schedules I and J, and Forms B22A and B22C. For example, is an amount listed on Schedule I and/or J for alimony, maintenance, or support payments?

b. If there is evidence that such information should have been provided, the Contractor must contact the debtor or debtor's counsel for a copy of the divorce decree and related information.

c. If the debtor provides an explanation as to why the information is not available, the Contractor must determine if the explanation is reasonable.

d. Note that this requirement includes debtors who filed jointly. They are required to provide the information if Schedules I and J

and Forms B22A and B22C contain alimony, maintenance, and support payments related to ex-spouses.

e. The Contractor should consider how long ago the debtor was, or appears to have been, divorced in assessing the relevance of the divorce decree to the audit.

D. Debtors are instructed in the Document Request not to provide original documents. If they do, the Contractor should review the originals, copy what is needed for the debtor audit, and return the originals to the debtor.

IV. REPORTING THE RESULTS OF THE DEBTOR AUDIT PROCEDURES

A. A Report of Audit, itemizing any material misstatements, or a Report of No Audit should be filed with the court and transmitted to the OUST and case trustee, by e-mail or regular mail, no later than **nine weeks (63 calendar days)** after the date of the Debtor Audit Notification Letter. Sample reports are provided at Exhibits 6 and 7. The Report of Audit or the Report of No Audit shall be attached to a cover page in bankruptcy court pleading format. A sample of the cover page is provided at Exhibit 5. If the report cannot be filed by this deadline, the Contractor must notify the OUST and provide a reason for the delay. The Contractor shall provide separately to the OUST (only) copies of any documents relied upon for determining the existence of a material misstatement. Such documents might include print-outs of database searches and records provided by the debtor.

1. The Report of Audit or Report of No Audit shall be in portable document format (PDF) for filing with the court and transmission by e-mail. Electronic data exchange may also be required.

2. As previously noted, a Report of No Audit is warranted when: (1) the debtor failed to respond to the Debtor Audit Notification Letter; (2) the debtor failed to provide a sufficient response to the Debtor Audit Notification Letter; or (3) the case was dismissed before a sufficient response was received.

B. If applicable, a Statement of Other Items of Interest should be provided separately to the OUST. [A sample Statement of Other Items of Interest is provided at Exhibit 8.] The Contractor should include any documents that support these other items of interest.

V. DEBTOR AUDIT PROCEDURES

A. Whether to report discrepancies as material misstatements or other items of interest is determined after all of the audit procedures have been completed. In some instances, the Contractor will need to obtain clarification or additional information from the debtor. The Contractor should allow sufficient time for

these inquiries. Note also that some individual misstatements must be considered on a cumulative basis for materiality.

B. Begin by reviewing the schedules and statements in their entirety to gain an understanding of the debtor's financial situation. An overview of the debtor's financial situation will help in the evaluation of whether the schedules and statements make sense. In addition, schedules and statements contain other useful information. For example, SOFA Question 15 lists prior addresses, which aid in the evaluation of database search results and identify locales for real property searches.

1. Review Schedules D, F, I, J, and the SOFA for evidence of real property and bank accounts not listed on Schedules A and B.

2. Review the SOFA for evidence of income sources not reported on Schedule I or Forms B22A and B22C.

3. Compare Schedules A, B, and G for assets that generate income not listed on Schedule I or Forms B22A and B22C.

C. Foot Schedule I and the income portions of Form B22A through Line 12 or Form B22C through Line 11.

D. Database Search – Utilizing key information, such as debtor name, address, and social security number, conduct at least two commercial database searches. Commercially available databases, such as ChoicePoint or Lexis-Nexis, must be used. The searches must be comprehensive (example: Discovery PLUS! in ChoicePoint). The purpose of conducting at least two searches is to corroborate the search results and to overcome some of the limitations inherent in individual commercial databases.

1. Search for real property ownership and disposition; compare to Schedule A.

2. Note evidence of unreported vehicles, watercraft, and similar types of personal property; compare to Schedule B.

3. Note evidence of interests in non-public corporations, general or limited partnerships, or limited liability companies; compare to Schedule B. For example, Secretary of State records may indicate entities for which the debtor is the registered agent.

4. Be alert for use of multiple social security numbers and promptly report the multiple use finding to the OUST.

E. Perform the following comparisons using publicly available web sites:

1. For potential unscheduled real property identified above, review a home valuation or other real estate valuation web-site to estimate its value. Review local property tax assessor web sites, if available, for information about real estate ownership and assessed and market values.

2. For potential unscheduled vehicles, watercraft, etc., review on-line sources to estimate their value. For example, www.kbb.com and www.nadaguides.com provide values for motor vehicles.

3. Using search engines such as Yahoo, Google, or other free local and national databases to search on the debtor's name, company, and investments in non-public entities. Such searches may identify, for example, unscheduled real estate and potential unscheduled sources of income for later corroboration with the debtor.

F. Review of Tax Returns

1. Review for evidence of ownership of interest-bearing accounts, stocks, bonds, and other investments that would produce current income; compare to Schedule I and Form B22A or B22C. If no such income is listed on Schedule I and Form B22A or B22C, review other available documents for evidence that the income-producing investments listed in the tax return were disposed of or liquidated prior to the petition date. If so, there is no finding.

2. Review for evidence of bank accounts not reported on Schedule B. If additional accounts appear to exist, determine if they were closed prior to the petition date (e.g, look at Question 11 in the SOFA).

3. Review for evidence of investments in non-public corporations, general or limited partnerships or limited liability companies; compare to Schedule B. If these investments appear to produce current income, compare to Schedule I and Form B22A or B22C.

4. Review for evidence of ownership of real estate; compare to Schedule A and Schedule I and Form B22A or B22C, if property is income-producing. If a tax return indicates ownership of real property that is not reported, review other available documents for evidence that property has been disposed of or liquidated prior to petition date (e.g., foreclosures or sales listed in the SOFA, or in database searches).

5. Compare amounts and types of non-wage income on tax return with income disclosed on Schedule I and Form B22A or B22C.

6. Determine whether any tax refunds attributable to tax years ending prior to the petition date were unpaid as of the petition date. For the tax year in which the petition was filed, evaluate whether a refund was likely, based on current income and tax withholding, and the amount of potential refund

that would have accrued through the petition date. If any tax refunds appear to be due to the debtor and were not listed on Schedule B, note as an other item of interest.

G. Review of Debtor (and Non-Debtor Spouse, if applicable) Payment Advices

1. Compare gross wage, salary, or commission income, including any overtime, reflected on the payment advices to that reported on Schedule I and Forms B22A and B22C. For review of Schedule I, if debtor is not paid monthly, convert debtor's wages per pay period to a monthly amount to make this comparison. Calculate the monthly amount of any understatement of gross monthly wages.

2. Compare deductions reflected on the payment advices to the amounts and descriptions listed on Schedule I. If the debtor is not paid monthly, convert the deductions for each pay period to monthly amounts to make this comparison. Evaluate the impact of any incorrect amounts and descriptions and inappropriate deductions. For example, garnishments should stop as of the petition date and should not be listed on Schedule I.

3. Review deductions for evidence of direct deposits into checking, savings, or investment accounts; determine whether the accounts are listed on Schedule B.

H. Review of Depository and Investment Account Statements, Canceled Checks, and Check Registers

1. Review the statements and check register or other documentation (annotations on statements, etc.) for sources of income not listed on Schedule I or Forms B22A and B22C. Determine the source, amount, and frequency of the income.

2. Review the statements, check registers, canceled/imaged checks, and other annotations/documentation for large, unusual, or unexplained payments (e.g., gifts or large cash withdrawals). Multiple payments of this type to a single recipient should be totaled. Ask the debtor to explain the sources of unidentified deposits and the purpose of unexplained transfers, withdrawals, and payments, unless the total amount of unexplained items is immaterial. For gifts or transfers other than ordinary payment on debt, review Questions 7 and 10 in the SOFA to determine if the gift or transfer was listed.

3. Compare the account names/numbers on the depository and investment account statements with information on Schedule B. If accounts are still open and not listed on Schedule B, determine the aggregate account balances as of the bankruptcy petition date.

4. Review the statements for evidence of additional open accounts (e.g., accounts to and from which funds are being transferred), not listed on Schedule B. Request in writing from the debtor or debtor's counsel statements for the additional accounts. Unreported accounts with unknown balances should be reported as an other item of interest.

5. Review statements and check register for evidence of purchase of income-producing investments or property; compare to Schedule I and Form B22A or B22C.

6. Review statements, check registers and canceled/imaged checks for evidence of purchase of or periodic payments for vehicles, boats, or other personal property valued at $5,000 or more. Compare to Schedule B to determine if property is listed. Compare to database search results for titled vehicles and watercraft. Note, however, that if the payment pertains to a lease listed on Schedule G, disregard.

I. Review of Divorce Decree/Property Settlement

1. Compare amounts to be received for maintenance and/or child support to amounts on Schedule I and Form B22A or B22C. If no amounts are listed on Schedule I and Form B22A or B22C:

a. Review Schedule B for evidence that it is not being received (i.e., large support receivable listed on Schedule B)

b. Review bank statements, tax returns, and Question 2 of SOFA for evidence that it is being received.

2. Review for an award of real property to the debtor that is not listed on Schedule A. If not listed, look for evidence of disposition. Consider the date of the divorce decree, i.e., when property was awarded.

3. Consider how long ago the debtor was, or appears to have been, divorced in assessing the relevance of the divorce decree to the audit.

J. If the Contractor identifies unreported real property through any of the foregoing procedures, request a written explanation for the unreported real property from the debtor. If the response is that the debtor has not owned the property within the two years prior to the bankruptcy petition date, obtain an affidavit or declaration under penalty of perjury from the debtor using the format at Exhibit 4 or another form approved by the EOUST or the OUST.

K. Sum the findings that impact the Total Combined Monthly Income listed on Schedule I and the income listed on Line 12 on Form B22A and Line 11 on Form B22C.

EXHIBITS

Exhibit 1. Debtor Audit Standards
Exhibit 2. Sample Debtor Audit Notification Notice with Attachments
Exhibit 2(a). Sample Debtor Audit Notification Letter-Represented Debtor
Exhibit 2(b). Sample Debtor Audit Notification Letter- *Pro Se* Debtor
Exhibit 2(c). Debtor Audit Form A
Exhibit 2(d). Instructions to Auditor Regarding Communications with Debtors
Exhibit 2(e). Information on Debtor Audits.
Exhibit 3. Sample Letter for Following Up on Debtor Audit Notification Letter
Exhibit 4. Affidavit of Non-Ownership
Exhibit 5. Cover Pleading for Debtor Audit Report
Exhibit 6. Illustrative Debtor Audit Report
Exhibit 7. Sample Report of No Audit
Exhibit 8. Sample Statement of Other Items of Interest

Exhibit 1 - Debtor Audit Standards

The Proposed Debtor Audit Standards

Debtor Audit Standard No. 1

The debtor audit engagement shall be performed by individuals having adequate technical training and proficiency for performing attest engagements.

Debtor Audit Standard No. 2

The debtor audit engagement shall be performed by individuals having adequate knowledge of bankruptcy petitions, schedules, and statements; the Bankruptcy Code; and the Federal Rules of Bankruptcy Procedure.

Debtor Audit Standard No. 3

In all matters relating to the debtor audit, an independence in mental attitude shall be maintained by the individuals performing the engagement.

Debtor Audit Standard No. 4

Due professional care shall be exercised in the planning and performance of the engagement.

Debtor Audit Standard No. 5

The work shall be adequately planned and assistants, if any, are to be properly supervised.

Debtor Audit Standard No. 6

Sufficient evidence must be obtained to provide a reasonable basis for the conclusion expressed in the report filed with the court.

Debtor Audit Standard No. 7

The report shall identify that the subject matter of the debtor audit is the petition, schedules, and other information as originally filed by the debtor in the bankruptcy case and state that the debtor audit was conducted in accordance with the Debtor Audit Standards and the procedures established by the United States Trustee Program.

Debtor Audit Standard No. 8

The report shall clearly and conspicuously state the conclusion as to the presence or absence of material misstatements in income, expenses, or assets, in the petition, schedules, and statements originally filed by the debtor in the bankruptcy case.

Debtor Audit Standard No. 9

The report shall state that it is intended solely for the information and use of the United States Trustee and other parties in interest to the bankruptcy case and that it is not intended to be and should not be used by anyone other than these specified parties; noting however, that since the report is a matter of public record, its distribution is not limited.

Exhibit 2(a) - Represented Debtor

Sample Debtor Audit Notification Letter-Represented Debtor
(Sent by Office of United States Trustee)

U.S. Department of Justice
Office of the United States Trustee

October 17, 2006

Debtor's Attorney
Debtor's Attorney Street Address
City, State, Zip

RE: JOHN and MARY DEBTOR
Case No.: 06-12345 ABC

Dear :

The above-referenced case has been selected for audit pursuant to 28 U.S.C. § 586(f)(1). The petition, schedules and other documents filed by the debtor(s) in this case will be audited by:

Debtor Audit Firm Name
Street Address
City, State, Zip
Phone Number

Enclosed with this letter are Debtor Audit Form A, Document Request, and Debtor Audit Form B, Instructions to Auditor Regarding Communications with Debtor(s). The debtor must complete Debtor Audit Form A as directed and return it to the auditor with the documents requested by (**DATE**-3 weeks from date of letter]. In addition, please review, sign, and return Debtor Audit Form B to the auditor at the address noted above *within three business days*. By completing Debtor Audit Form B, you provide instructions to the auditor about whether the auditor should contact you or the debtor if the auditor has additional questions regarding the audit.

In connection with this audit, the debtor has an affirmative duty to cooperate with and provide information to the auditor. 11 U.S.C. § 521(a)(3) and (4). Failure to provide the requested information may be cause for dismissal of the case, denial or revocation of the debtor's discharge pursuant to 11 U.S.C. § 727, or other appropriate relief.

Sample Debtor Audit Notification Letter-Represented Debtor
(Sent by Office of United States Trustee)

I also enclose "Information on Debtor Audits" with this letter. You may forward it to your client for review. If you have questions, please contact either the auditor or the undersigned.

Yours truly,

Assistant United States Trustee

Enclosures: Debtor Audit Forms A and B
Information on Debtor Audits

cc: Debtor Audit Firm
Trustee

Exhibit 2(b) - *Pro Se* Debtor

Sample Debtor Audit Notification Letter- *Pro Se* Debtor
(Sent by Office of United States Trustee)

U.S. Department of Justice
Office of the United States Trustee

October 17, 2006

Debtor(s)
Street Address
City, State, Zip

RE: JOHN and MARY DEBTOR
Case No.: 06-12345 ABC

Dear :

Your bankruptcy case has been selected for audit pursuant to 28 U.S.C. § 586(f)(1). The petition, schedules and other documents filed by the debtor(s) in this case will be audited by:

Debtor Audit Firm Name
Street Address
City, State, Zip
Phone Number

Debtor Audit Form A must be completed as directed and returned to the auditor with the documents requested on Debtor Audit Form A by (**DATE**-3 weeks from date of letter]:

In connection with this audit, please remember that you have an affirmative duty to cooperate with and provide information to the auditor. 11 U.S.C. § 521(a)(3) and (4). Failure to provide the requested information may be cause for dismissal of the case, denial or revocation of your discharge pursuant to 11 U.S.C. § 727, or other appropriate relief.

Sample Debtor Audit Notification Letter- *Pro Se* Debtor
(Sent by Office of United States Trustee)

I have enclosed "Information on Debtor Audits" for your review. If you have questions, please contact either the auditor or the undersigned.

Yours truly,

Assistant United States Trustee

Enclosures: Debtor Audit Form A
Information on Debtor Audits

cc: Debtor Audit Firm
Trustee

Exhibit 2(c) - Debtor Audit Form A

Debtor(s): _____ **Case No.:** _____
Attorney: _____ **Petition Date:** _____

DOCUMENT REQUEST

Please provide copies of the documents listed below. *Do not provide originals.* Return this form and the attached documents by [DATE-3 weeks from date of Audit Notification Letter] to: Debtor Audit Firm; Street Address; City, State, Zip.

In the space provided next to each document category listed below, indicate whether all the documents requested are provided by marking Yes, No, or N/A. Explain all No or N/A answers at the end of this form. You do not need to explain a N/A answer to Question No. 4.

1	Payment advices or other evidence of payment from an employer for the six months preceding the date of the bankruptcy petition from the debtor(s), or from an individual debtor and the individual debtor's non-filing spouse unless the debtor has checked Box 2.b on Form B22A.	____
2	Federal income tax returns, including all schedules and all W-2, 1099, and K-1 forms, for the two most recent taxable periods prior to the date of the bankruptcy petition. If either of the returns has not been filed, provide copies of the two most recently filed federal income tax returns. (If joint case and debtors filed separate returns, provide both returns.)	____
3	Account statements for all depository and investment accounts in which the debtor(s) had an interest for the six months preceding the date of the bankruptcy petition, including the month in which the petition was filed; along with sufficient documentation to explain the source of every deposit or credit, and the purpose of every check, withdrawal, or debit. (Include information for checking, savings, money market, mutual fund, and brokerage accounts. Examples of documentation for deposit and withdrawal transactions include canceled or imaged checks, check registers, and annotations on or attached to the account statements.)	____
4	If the debtor(s) is divorced, (a) the divorce decree, (b) any orders regarding property settlements entered within the last three years, and (c) any alimony or child support orders currently in effect and amendments thereto.	____

Explanation for any "No" or "N/A" responses (attach pages as necessary): _____

I declare under penalty of perjury that the responses to this Document Request are true and correct.

Date: _____ Signature: _____
Debtor

Date: _____ Signature: _____
Joint Debtor, if any

Exhibit 2(e) - Debtor Audit Information Sheet

Information on Debtor Audits

Individuals who file for relief under chapter 7 or chapter 13 of the Bankruptcy Code are subject to audits. At least one out of every 250 chapter 7 and chapter 13 individual cases will be randomly selected for audit. In addition, other cases will be selected for audit.

Your case has been selected for audit. The audit involves the verification of the income, expenses, and assets reported by you in the bankruptcy schedules and statements. You are required to provide some additional information and records and cooperate with the auditor and provide this information promptly. There is no cost to you for the audit, except for the cost of making copies of documents needed for the audit. The information that you provide in connection with your case is subject to examination by the Attorney General or his designee.

The auditor will file a report containing the results of the audit. A copy of the report will be provided to your attorney (or directly to you if you are not represented). If the auditor finds material misstatements of income, expenses, or assets, the clerk of the bankruptcy court will notify your creditors.

Failure to cooperate with the auditor, or failure to reasonably explain to the bankruptcy court any material misstatements contained in the auditor's report, may result in the dismissal of your case or in the denial or revocation of your discharge, and, possibly, in referral of the matter to the United States Attorney for criminal investigation.

Exhibit 2(d) - Debtor Audit Form B

Debtor(s): _____ Case No.: _____
Attorney: _____ Petition Date: _____

Instructions to Auditor Regarding Communications with Debtors

Part I: Purpose

Pursuant to 28 U.S.C. § 586(f)(1), the auditor will conduct a review of the accuracy, veracity, and completeness of the petition, schedules, and statements filed by your client in the above-referenced bankruptcy case. Your client is required to cooperate with the auditor in completing the audit. 11 U.S.C. § 521. A failure to cooperate may result in dismissal of the case or a denial or revocation of discharge. To complete the audit, the auditor may need to interact with your client. This document asks you to advise the auditor how those contacts may occur.

Part II: Waiver Election

_____ The auditor may contact my client directly to obtain the information necessary to complete the debtor audit. The auditor shall provide me with copies of any written communications with my client. The telephone number for my client is _____.

_____ The auditor may not communicate directly with my client concerning the debtor audit. All contact must be through my office. My telephone number is _____.

Debtor's Attorney: Please contact the Office of the United States Trustee immediately if you believe that the Auditor is not complying with this election.

Dated:

_____
Attorney for Debtor(s)

Return original of this signed form to the Auditor at the address shown below. You should not file this form with the bankruptcy court.

Debtor Audit Firm Name
Street Address
City, State, Zip
Phone Number

Exhibit 4 - Affidavit of Non-Ownership

To: Contractor
Contractor Street Address
City, State, Zip

Affidavit of Non-Ownership

State of _____)
) ss
County of _____)

Comes now _____ of _____, debtor in case number _____ filed in the _____ District of _____, and declares that he/she does not now own and has not previously owned in the two years prior to the filing of the petition commencing the case listed above the following described real estate/personal property:

(Provide description of property/legal description here)

Further your affiant sayeth not. Executed this ____ day of _____, 200_.

_____
(Debtor signature)

_____
(Joint Debtor signature, if any)

On the date set forth above, _____, appeared before me and affixed his/her signature hereto.

(Seal) _____
Notary Public

_____
Commission expiration date:

On the date set forth above, _____, appeared before me and affixed his/her signature hereto.

(Seal) _____
Notary Public

_____
Commission expiration date:

Exhibit 3 - Sample Follow-Up Letter

Sample Letter for Following Up on Debtor Audit Notification Letter

Debtor's Attorney/*Pro Se* Debtor
Street Address
City, State, Zip

Re: Debtor Name(s)
Bankruptcy Case No. xx-xxxxx

Dear xxxxx:

Our records indicate that on [date of Debtor Audit Notification Letter], the Office of United States Trustee for the District of xxxx, notified you that [your client's]/[your] bankruptcy case was selected for an audit pursuant to 28 U.S.C. § 586(f)(1). The letter, a copy of which is enclosed, requested that information be supplied to this firm within 21 days of the date of the letter.

To date, we have not heard from you. Pursuant to our agreement with the United States Trustee Program, we will issue a "Report of No Debtor Audit" if we do not receive the requested materials within seven days. This report may result in the filing of a complaint to deny or revoke [your client's]/[your] discharge or other action by the United States Trustee.

Respectfully,

[Contractor representative]

Enclosure

cc: United States Trustee
Case trustee

Certificate of Service

I hereby certify that a copy of this report has been sent to the trustee and counsel for the debtor, by regular mail, postage prepaid, on this _____ day of _____, 2007.

_____

Exhibit 5 - Cover Pleading

Cover Pleading for Debtor Audit Report or Report of No Audit
(to be filed by Contractor)

UNITED STATES BANKRUPTCY COURT
_____DISTRICT OF _____

In re:	)	
	)	
JOHN A. DEBTOR	)	Case No. 06-12345 ABC
	)	Chapter ____
MARY B. DEBTOR	)	
	)	
Debtor(s).	)	

REPORT OF DEBTOR AUDIT

Pursuant to 28 U.S.C. § 586(f)(1), the United States Trustee contracted for an audit to be performed of the above-captioned debtor's petition, schedules and other information filed by the debtor in this case.

The report of the auditor, which is attached, indicates the following:

_____ The audit was not completed because the debtor either did not respond to the auditor's requests for information or did not provide a sufficient response.

_____ The audit was completed. No material misstatements concerning the debtor's income, expenses, or assets were reported.

_____ The audit was completed. The auditor found one or more material misstatements concerning the debtor's income, expenses, or assets.

Dated this _____ day of _____, 200_.

Respectfully submitted,
XXXX XXXXXXX
DEBTOR AUDIT FIRM

_____

By:_____

List of Material Misstatements (Sample Format)

Material Misstatement		Explanation	As Reported in Schedules and Forms	As Found in Audit
No.	Description			
1				
2				
3				
4				
5				

Exhibit 6 - Sample Report of Audit

Illustrative Debtor Audit Report

To the United States Trustee for the District of x, Region x:

In accordance with the Debtor Audit Standards established pursuant to Section 603(a) of Public Law 109-8, [Contractor] performed the procedures enumerated in the contract between it and the United States Trustee Program to determine whether certain items in the bankruptcy petition, schedules, and statements as originally filed by [Debtor Name] in Bankruptcy Case No. [xx-xxxxx] contain material misstatements concerning the debtor's income, expenditures, or assets.

The auditor finds:	
No material misstatements.	
One or more material misstatements. The material misstatements are listed on the attached List of Material Misstatements.	✓

The debtor was responsible for the preparation of the bankruptcy petition, schedules, and statements in this case. The United States Trustee Program is responsible for the sufficiency of the procedures developed to determine the accuracy, veracity, and completeness of the petitions, schedules and other information that the debtor is required to provide under 11 U.S.C. §§ 521 and 1322. [Contractor] makes no representation regarding the sufficiency of the procedures either for the purpose for which this report has been requested or for any other purpose.

This report is intended solely for the information and use of the United States Trustee Program and parties-in-interest in the case and is not intended to be and should not be used by anyone other than these parties. However, this report is a matter of public record and its distribution is not limited.

Respectfully Submitted,

Contractor

Exhibit 8 - Sample Statement of Other Items of Interest

Sample Statement of Other Items of Interest

To the United States Trustee for the District of x, Region x:

In connection with the Debtor Audit of [Debtor's Name] in Bankruptcy Case No. [xx-xxxxx], we identified the following additional matters to bring to the attention of the United States Trustee. In accordance with the instructions in our contract, we are reporting these items to you separately either because they do not rise to the level of material misstatements or because we were unable to uncover sufficient evidence to determine whether they were material misstatements.

[Identify other items of interest]

Included with this letter are the documents that support the material misstatements cited in the Debtor Audit Report as well as the documents that support the other items of interest listed above.

If you have any questions, please contact me.

Sincerely,

Contractor

Attachments

Sample Report of No Audit

Report of No Debtor Audit

To the United States Trustee for the District of x, Region x:

On xx date, the United States Trustee Program assigned [Contractor] to perform the procedures enumerated in the contract between this company and the United States Trustee Program, to determine whether certain items in the bankruptcy petition, schedules, and other information that the debtor is required to provide under 11 U.S.C. §§ 521 and 1322, as originally filed by [Debtor Name] in Bankruptcy Case No. xx-xxxxx, contained material misstatements concerning the debtor's income, expenditures, or assets. The audit procedures could not be completed because: [choose one or more as applicable] (1) the debtor failed to respond to the Debtor Audit Notification Letter; (2) the debtor failed to provide a sufficient response to the Debtor Audit Notification Letter; or (3) or the case was dismissed before a sufficient response was received.

Respectfully submitted,

[Contractor]

Attachment E – Audit Services Pricing Schedule

Type of Audit	Bid Price (per audit)
Random Audit	$ _____
Targeted Audit	$ _____
"No Audit"	$ _____

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE	PAGE OF PAGES
	1 3

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
M001	10/12/2006		

6. ISSUED BY CODE EOUST/ASD

U.S. Department of Justice
Executive Office for US Trustees
Administrative Services Division
20 Massachusetts Avenue, NW
Room 8217
Washington DC 20530

7. ADMINISTERED BY (If other than Item 6) CODE EOUST/ASD

Executive Office for U.S. Trustees
Administrative Services Division
20 Massachusetts Avenue, NW
Room 8217
Washington DC 20530

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)

TICHENOR & ASSOCIATES
Attn: WILLIAM TICHENOR
303 MIDDLETOWN PARK PLACE
SUITE C
LOUISVILLE KY 40243-5054

CODE FACILITY CODE

(x) 9A. AMENDMENT OF SOLICITATION NO.

9B. DATED (SEE ITEM 11)

X 10A. MODIFICATION OF CONTRACT/ORDER NO.
GS-23F-9824H
7F-UST-00016

10B. DATED (SEE ITEM 11)
07/17/2006

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended. ☐ is not extended.
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)
See Schedule

Net Increase: $144,500.00

13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

CHECK ONE	
	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
X	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
	D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor ☒ is not ☐ is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

Tax ID Number: 61-1019321
DUNS Number: 102118296
AVAILABILITY OF FUNDS - CONTINUING RESOLUTION
Because the Department of Justice is currently operating under a Congressional Continuing Resolution, funds are not available for full performance of this effort beyond Novermber 17, 2006. The Anti-Deficiency Act forbids Federal agencies from allowing Contractors to perform services which would incur costs beyond the limitation of current funding. The Contractor may perform services beyond the current level of funding only as program funds are made available through Congressional appropriation. If funding should not be made available for full performance, the Government may terminate this purchase order for the convenience of the Government, and the Government's liability will not exceed that
Continued ...

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
		MICHAEL F. LEAMON	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
(Signature of person authorized to sign)		(Signature of Contracting Officer)	10/12/2006

NSN 7540-01-152-8070
Previous edition unusable

STANDARD FORM 30 (REV. 10-83)
Prescribed by GSA
FAR (48 CFR) 53.243

CONTINUATION SHEET	REFERENCE NO. OF DOCUMENT BEING CONTINUED GS-23F-9824H/7F-UST-00016/M001	PAGE 3 OF 3

NAME OF OFFEROR OR CONTRACTOR
TICHENOR & ASSOCIATES

ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)
	Change Item 0001 to read as follows(amount shown is the obligated amount):				
0001	RANDOM AUDITS - ESTIMATED QUANTITY Accounting Info: 074496; OC: 2537; YREGDOC: G 01	350	EA	300.00	105,000.00
	Change Item 0002 to read as follows(amount shown is the obligated amount):				
0002	TARGETED AUDITS - ESTIMATED QUANTITY Accounting Info: 074496; SOC: 2537; YREGDOC: G 01	65	EA	600.00	39,000.00
	Change Item 0003 to read as follows(amount shown is the obligated amount):				
0003	NO AUDITS - ESTIMATED QUANTITY Accounting Info: 074496; OC: 2537; YREGDOC: G 01	10	EA	50.00	500.00

EXHIBIT 3

Debtor(s): Case No.:
Attorney:_____

Instructions to Audit Firm Regarding Communications with Debtors

Part I: Purpose

Pursuant to 28 U.S.C. § 586(f)(1), the audit firm will conduct a review of the accuracy, veracity, and completeness of the petition, schedules, and statements filed by your client in the above-referenced bankruptcy case. Your client is required to cooperate with the audit firm in completing the audit. 11 U.S.C. § 521. A failure to cooperate may result in dismissal of the case or a denial or revocation of discharge. The audit firm may need to interact with your client regarding documents necessary to complete the audit. This document asks you to advise the audit firm how those contacts may occur.

Part II: Waiver Election

_____ The audit firm may contact my client directly to obtain the documents necessary to complete the debtor audit. The audit firm shall provide me with copies of any written communications with my client. The telephone number for my client is _____.

_____ The audit firm may not communicate directly with my client concerning the debtor audit. All contact must be through my office. My telephone number is _____.

Authorization for contact by the audit firm with debtor(s) as provided herein does not release, waive or affect in any manner the duties imposed upon you pursuant to 11 U.S.C. §329, Fed. R. Bankr. P. 2016(b), the Disclosure of Compensation of Attorney for Debtor(s), local court rules, and the applicable rules of professional responsibility.

Debtor's Attorney: Please contact the Office of the United States Trustee immediately if you believe that the Audit Firm is not complying with this election.

Dated:

_____
Attorney for Debtor(s)

Return original of this signed form to the Audit Firm at the address shown below. You should not file this form with the bankruptcy court.

Debtor Audit Firm Name
Street Address
City, State, Zip
Phone Number

EXHIBIT 4

The following individuals were consulted with or provided comments on the credit counseling and debtor education procedures, policies, and rules. This list may not include all parties who provided input because we do not maintain a central calendar or call log of all contacts. Many of the contacts were consulted on multiple occasions. This list excludes contacts within the federal government.

ORGANIZATION	CONTACT NAME(S)
American Association of Debt Management Organizations	Mark Guimond, President
American Credit Alliance, Inc.	Alan Franklin, President
Anderson, Converse & Fennick, P.C.	William C. Anderson, Esquire
Association for Financial Counseling and Planning Education	Sharon Burns Debbie Vosburg
Association of Financial Health Counselors	Kathy Petrillo, M.A.
Association of Independent Consumer Credit Counseling Agencies (AICCCA)	David Jones, President Suzanne Bingham, Executive Director Phil Corwin, Esquire Joel Greenberg, AICCCA Trustee Tiff Worley, AICCCA Trustee
Bank of America	Richard Campbell, Executive Vice President Michael Radesky, Executive Vice President
Better Business Bureau	Michael McEnemy, Esquire Jeff Tassey
BK Navigator	Joseph Stasio
Boeing Employees Credit Union	Gary Oakland, President Joe Brancucci, Vice-President
Central District of California Consumer Bankruptcy Attorneys' Association	Kathleen March, Esquire
Chase Bankcard Services, Inc.	John Hart, Vice President Bill Herberger, Regional Vice President

ORGANIZATION	CONTACT NAME(S)
Clearpoint Financial Solutions	Daniel Oelrich, President Barry Coleman
Coalition for Consumer Bankruptcy Debtor Education	Professor Karen Gross (NYU Law School)
Community Credit Counseling	Chad Gentry, Executive Director
Community Legal Services	Paul Uyehara, Esquire
Consumer Credit Counseling Services of the Black Hills	Julie Stone, Director of Counseling
Consumer Credit Counseling Services of Greater Atlanta	Suzanne Boas Mark Cole
Consumer Credit Counseling Services of Linn-Benton	Jan Amling
Consumer Credit Counseling Services of North Central Texas	Danny Wolf, President
Consumer Credit Counseling Services of San Francisco	Joanne Budde
Consumer Federation of America	Travis Plunkett, Legislative Director
Council on Accreditation	Joseph Seoane, Director of Trustee and Client Relations
Credit Union National Association	Jeffrey Bloch, Esquire Kathy Thompson, Esquire
Discover Financial Services	Wayne Johnson, Senior Vice President Kim Smith
Family Life Credit Services	Patricia Larson, President
Financial Services Roundtable	Steve Bartlett, President John McMickle, Esquire
First USA Bank, NA	Bill Herberger, Regional Vice President Conrad Vasquez, Executive Vice President
Fleet Credit Card Services	Ray Bell, Operations Director Howard Knauer, Senior Vice President
Florida State University	Professor Elizabeth Goldsmith

ORGANIZATION	CONTACT NAME(S)
Garden State Credit Counseling	Joel Greenburg
GE Card Services	Mel Kulhanek, Senior Vice President Curtis Roy
Greater Washington Urban League	Maudina Cooper Diane Simmons
Greenpath Debt Solutions	Rick Bialobrzeski
Habitat for Humanity	Carol Casperson, Executive Director
Hummingbird Credit Counseling and Education, Inc.	Victoria Wright
Illinois Attorney General's Office	Karen Winberg-Jensen
InCharge Institute of Orlando, Florida	Robert W. Closs, Jr. Al Duarte
Individual	Professor Susan Block-Lieb
Individual	James Boyd, Chapter 7 Trustee
Individual	David Cotton, Managing Partner, Cotton & Company, LLP
Individual	Jeff Lubbers, Esquire
Individual	William Sabin
Individual	Mark D. Taylor, Trustee in AmeriDebt Bankruptcy Case
Individual	Roger Whelan, Former ABI Scholar and Bankruptcy Judge
Individual	Professor Mary Jo Wiggins (University of San Diego Law School)
Individual	Professor Todd Zywicki (George Mason Law School)
Institute of Financial Literacy	Leslie Linfield
JP Morgan Chase	Richard Srednicki, Executive Vice President

ORGANIZATION	CONTACT NAME(S)
Manna, Inc.	Edith Cromwell Willamena Samuels
Maryland Attorney General's Office	Phil Zipperman
Massachusetts Attorney General's Office	Chris Barry-Smith
MBNA	Maureen Sierocinski, Senior Vice President
Money Management International	Ivan Hand, President David Juengel, CFO
National Association of Attorneys General	Karen Cordry, Bankruptcy Counsel Sarah Reznek, Consumer Protection Counsel
National Association of Certified Credit Counselors	Amanda Evans
National Association of Consumer Bankruptcy Attorneys	Brad Botes Norma Hammes Henry Sommer
National Association of Federal Credit Unions	Fred Becker, Jr., President Merric Chanou
National Consumer Law Center	Deann Loonin John Rao
National Credit Union Administration	Robert Loftus
National Foundation for Credit Counseling	Susan Keating, President William Binzel, Vice President and General Counsel Michael Turner
National Institute for Financial Counseling Education	Heather C. Aiello
Peregrin Services Corp.	Michael Morency
Rushmore Consumer Credit Resource Center	Bonnie Spain
South Dakota State University Extension	Professor Elizabeth Gorham
Springboard Nonprofit Consumer Credit Management	Dianne Wilkman, President

ORGANIZATION	CONTACT NAME(S)
SRA International	Debbie Kochubka Sandra Nickerson Karen Popular-Lawhorn
Start Fresh Today	Kevin Chern, Esquire
Surety Association of America	
Surety & Fidelity Association of America	Matt Klimczak
Take Charge America	Mike Hall, CEO John J. Fisher, Senior Vice President and Director of Business Development Robert Fisher, Esquire
Texas Attorney General's Office	Paul Singer
Trustee Education Network	Marion Olsen, Esquire
University Extensions and Cooperatives Represented by U.S. Department of Agriculture Liaison	Jane Schuchardt
Venable and Associates	Jeff Tenenbaum, Esquire
VISA, Inc.	Melyssa Barrett, Risk Product Solutions

EXHIBIT 5:

USTP PERSONNEL DETAILED TO EOUST
OVER THE PERIOD OF JANUARY 1, 2004 THROUGH JULY 30, 2007

Employee Name	Title	Office/Unit of Detail	Weeks Detailed
Armengol, Johanna	Trial Attorney	Credit Counseling/Debtor Education	5
Arso, Courtney	Paralegal Specialist	Credit Counseling/Debtor Education	1
Asbach, Dave	Trial Attorney	Credit Counseling/Debtor Education	9
Baddin, Gary	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Balderson, Susan	Bankruptcy Analyst	Credit Counseling/Debtor Education	3
Baltzell, Mary Kay	Bankruptcy Analyst	Credit Counseling/Debtor Education	8
Baran, Alfreda	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Bender, Darrell	Bankruptcy Analyst	Credit Counseling/Debtor Education	12
Berry, David	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Bloom, Margaret	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Buchbinder, David	Trial Attorney	Credit Counseling/Debtor Education	5
Bumann, Craig	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Burnette, Cynthia	Assistant U.S. Trustee	Credit Counseling/Debtor Education	22
Bylinski, Sue	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Catapano, Maria	Paralegal Specialist	Credit Counseling/Debtor Education	30
Confer, Martha	Bankruptcy Analyst	Credit Counseling/Debtor Education	7
Conlon, Debera	Assistant U.S. Trustee	Office of Review and Oversight	32
Cooper, Cathy	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Courshon, Bill	Trial Attorney	Credit Counseling/Debtor Education	4
Creel, Katherine	Administrative Officer	Credit Counseling/Debtor Education	4
Cruse Jancanc	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Daugherty, John	Trial Attorney	Credit Counseling/Debtor Education	6
Dean, Lynda	Legal Clerk	Credit Counseling/Debtor Education	6
DeAngelis, Roberta	Assistant U.S. Trustee	Office of General Counsel	118
Del Forn, Roland	Bankruptcy Analyst	Credit Counseling/Debtor Education	1
Dennis, Kenneth	Bankruptcy Analyst	Credit Counseling/Debtor Education	3
DePasquale, Leonard	Trial Attorney	Office of General Counsel	3
Dillon, David	Bankruptcy Analyst	Credit Counseling/Debtor Education	3
DiPietro, Joseph	Bankruptcy Analyst	Credit Counseling/Debtor Education	73
Dorsey, Barbara	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Dubose, Thomas	Bankruptcy Analyst	Credit Counseling/Debtor Education	4
Ebright, Daniel	Bankruptcy Analyst	Credit Counseling/Debtor Education	8
Elwood, Kenneth	Bankruptcy Analyst	Credit Counseling/Debtor Education	4
Epstein, Kevin	Trial Attorney	Civil Enforcement Unit/Debtor Audits	7
Fahey (Dugan), Patricia	Trial Attorney	Credit Counseling/Debtor Education	14
Farr, Scarlett	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Farrow, Scott	Trial Attorney	Credit Counseling/Debtor Education	6
Felton, Marilyn	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Fittipaldi, Brian	Trial Attorney	Credit Counseling/Debtor Education	4

Employee Name	Title	Office/Unit of Detail	Weeks Detailed
Fitzgerald, John	Assistant U.S. Trustee	Credit Counseling/Debtor Education	22
Fornari, Joe	Trial Attorney	Credit Counseling/Debtor Education	8
Fox, Betty Ruth	Trial Attorney	Credit Counseling/Debtor Education	4
Gee James	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Gonzalez, Maria	Trial Attorney	Credit Counseling/Debtor Education	2
Green, Christine	Paralegal Specialist	Office of General Counsel	15
Grimes, Gary	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Gulden, Cameron	Trial Attorney	Credit Counseling/Debtor Education	4
Gullicks, Pete	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Guzek, John	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Halsey, Becky	Bankruptcy Analyst	Credit Counseling/Debtor Education	3
Harper, Alisa	Bankruptcy Analyst	Credit Counseling/Debtor Education	20
Haynes, Sean	Trial Attorney	Credit Counseling/Debtor Education	4
Hilmer, Roy	Bankruptcy Analyst	Credit Counseling/Debtor Education	4
Hobbs, Henry	Assistant U.S. Trustee	Credit Counseling/Debtor Education	96
Horton, Randy	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Janovsky, Laddy	Bankruptcy Analyst	Credit Counseling/Debtor Education	5
Jones, Janet	Administrative Officer	Credit Counseling/Debtor Education	2
Kadotani, Thomas	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Kistler, Sara	Assistant U.S. Trustee	Office of Review and Oversight and Office of the Director	48
Kleiner, Thomas	Bankruptcy Analyst	Credit Counseling/Debtor Education	4
Kohen, Lynn	Trial Attorney	Credit Counseling/Debtor Education	< 1
Kozlowski, David	Bankruptcy Analyst	Credit Counseling/Debtor Education	20
LaShelle, Jean	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Layton, Lynn	Bankruptcy Analyst	Credit Counseling/Debtor Education	4
Long, Leo	Trial Attorney	Credit Counseling/DebtorEducation	10
Marquez, Maria	Bankruptcy Analyst	Credit Counseling/Debtor Education	4
McCall, Thomas	Bankruptcy Analyst	Credit Counseling/Debtor Education	4
McDow, Clarkson	United States Trustee	Office of Review and Oversight	42
Miller, Robert	Assistant U.S. Trustee	Office of Review and Oversight and Office of Research and Planning	90
Mobley, Darin	Legal Clerk	Credit Counseling/Debtor Education	2
Montanez, Mary Ellen	Secretary	Credit Counseling/Debtor Education	44
Moore, Melinda	Program Training Ofcr.	Office of the Director	26
Morawitz, James	Trial Attorney	Office of General Counsel	6
Mueller, Lloyd	Trial Attorney	Credit Counseling/Debtor Education	3
Mullin, James	Bankruptcy Analyst	Credit Counseling/Debtor Education	3
Neal, Mark	Assistant U.S. Trustee	Credit Counseling/Debtor Education	26
Newton, Walter (Tom)	Legal Clerk	Credit Counseling/Debtor Education	11
Okimoto, Anson	Bankruptcy Analyst	Credit Counseling/Debtor Education	6
Orr, William	Bankruptcy Analyst	Credit Counseling/Debtor Education	4
Ortiz, David	Trial Attorney	Credit Counseling/Debtor Education	6
Otto, Glenn	Bankruptcy Analyst	Credit Counseling/Debtor Education	4

Employee Name	Title	Office/Unit of Detail	Weeks Detailed
Page, Alice	Trial Attorney	Credit Counseling/Debtor Education	2
Painter, Allen	Bankruptcy Analyst	Credit Counseling/Debtor Education	12
Perdue, Brad	Bankruptcy Analyst	Credit Counseling/Debtor Education	7
Petesch, Sabrina	Trial Attorney	Credit Counseling/Debtor Education	7
Poole, Paul	Bankruptcy Analyst	Credit Counseling/Debtor Education	5
Quinn, David	Bankruptcy Analyst	Credit Counseling/Debtor Education	7
Rader, Richard	Bankruptcy Analyst	Credit Counseling/Debtor Education	7
Raleigh, Marjorie	Trial Attorney	Credit Counseling/Debtor Education	4
Rushing, Cindi	Paralegal Specialist	Credit Counseling/Debtor Education	2
Schlosser, Sherri	Paralegal Specialist	Credit Counseling/Debtor Education	28
Schmidt, Erin	Trial Attorney	Credit Counseling/Debtor Education	5
Schneiderman, Steve	Trial Attorney	Credit Counseling/Debtor Education	2
Sellars, Troy	Trial Attorney	Credit Counseling/Debtor Education	7
Shedd, John	Bankruptcy Analyst	Credit Counseling/Debtor Education	7
Shuster, Bonnie	Bankruptcy Analyst	Credit Counseling/Debtor Education	13
Simmons, Christy	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Snyder, James	Trial Attorney	Credit Counseling/Debtor Education	7
Sonson, Christopher	Bankruptcy Analyst	Credit Counseling/Debtor Education	7
Sorensen, Marilyn	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Spangler, Richard	Bankruptcy Analyst	Credit Counseling/Debtor Education	3
Stanley, Patti	Trial Attorney	Credit Counseling/Debtor Education	7
Statham, Steve	Trial Attorney	Credit Counseling/Debtor Education	6
Stoneman, Sharon	Bankruptcy Analyst	Credit Counseling/Debtor Education	1
Streete, Alisa	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Swenson, Glenn	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Tharp, Sammye	Trial Attorney	Credit Counseling/Debtor Education	4
Theus, Walter	Trial Attorney	Office of General Counsel	31
Thompson, Janet	Legal Clerk	Credit Counseling/Debtor Education	2
Thorton, Tom	Bankruptcy Analyst	Credit Counseling/Debtor Education	7
Tierney, Brian	Bankruptcy Analyst	Credit Counseling/Debtor Education	6
Tinker, Patrick	Trial Attorney	Office of General Counsel	4
Truslow, Harry	Bankruptcy Analyst	Credit Counseling/Debtor Education	2
Vandenberg, Todd	Bankruptcy Analyst	Credit Counseling/Debtor Education	9
Verhaal, Suzanne	Bankruptcy Analyst	Credit Counseling/Debtor Education	76
Walsh, Edward	Bankruptcy Analyst	Credit Counseling/Debtor Education	31
Walton, Donald	Assistant U.S. Trustee	Office of the General Counsel and Office of the Director	136
Weaver, John	Bankruptcy Analyst	Credit Counseling/Debtor Education	11
Wencil, Sarah	Trial Attorney	Credit Counseling/Debtor Education	4
Wieland, Dick	Trial Attorney	Credit Counseling/Debtor Education	12
Williams, Audrey	Paralegal Specialist	Office of General Counsel	10
Wright, Todd	Bankruptcy Analyst	Credit Counseling/Debtor Education	46
Zeinemann, Tom	Bankruptcy Analyst	Credit Counseling/Debtor Education	2